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July 29, 2005

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

By Hand Delivery



Re: STB Docket No. 42060 (Sub-No. 1), North America Freight Car Association v. Burlington Northern and Santa Fe Railway Company.

Dear Secretary Williams:

Enclosed for filing is a signed original and 10 copies of a Public Version of Complainants' Opening Statement of Fact and Argument, Volumes I and II, in the above-referenced case. Also enclosed is a disk containing a copy of the same.

Respectfully submitted,

Andrew P. Goldstein  
Attorney for Complainants

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. 42060 (SUB-NO. 1)**

**NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.**

**v.**

**BNSF RAILWAY COMPANY**

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**COMPLAINANTS' OPENING STATEMENT  
OF FACT AND ARGUMENT**

**VOLUME I**

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JUL 29 2005

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Public Record

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**Dated: July 29, 2005**

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This proceeding arises from a complaint brought by North America Freight Car Association (“NAFCA”) and certain of its individual members<sup>1</sup> against BNSF Railway Company, formerly The Burlington Northern and Santa Fe Railway Company (“BNSF”). The amended complaint contends that the actions of BNSF, described more fully below, constitute (a) unreasonable practices in violation of 49 U.S.C. § 10702, (b) a failure to furnish adequate car service and to establish, observe, and enforce reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a), (c) a violation of the demurrage provisions of 49 U.S.C. § 10746, and (d) a violation of the provisions of 49 U.S.C. § 10745 which entitle shippers who furnish a service or instrumentality of transportation to be compensated by the carrier. The complaint seeks an order requiring BNSF to terminate any practices found to be unlawful and to pay monetary damages to those parties seeking damages who have been injured by BNSF’s unlawful actions.

This Opening Statement of Complainants is accompanied and supported by Exhibit No. 1, the Verified Statement of Dan Mack on behalf of NAFCA and CHS; Exhibit No. 2, the Verified Statement of Randy Neumayer on behalf of ADM; Exhibit No. 3, the Verified Statement of Terry J. Voss on behalf of AGP; Exhibit No. 4, the Verified Statement of Darrell R. Wallace on behalf of Bunge; Exhibit No. 5, the Verified Statement of Frank Sims on behalf of Cargill; Exhibit No. 6, the Verified Statement of Bryan Gustafson on behalf of ConAgra; Exhibit No. 7, the Verified Statement of Lynn A. Hiser on behalf of Tate & Lyle; Exhibit No. 8, the Joint Verified Statement of Thomas D. Crowley and Philip H. Burris on behalf of L.E. Peabody and Associates (“L.E. Peabody”); and

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<sup>1</sup> Ag Processing, Inc. (“AGP”); Archer Daniels Midland Company (“ADM”); Bunge North America, Inc. (“Bunge”); Cargill, Inc. (“Cargill”); CHS, Inc. (“CHS”); Chicago Freight Car Leasing Company (“CFCL”); ConAgra Food Ingredients Company (“ConAgra”); First Union Rail (“First Union”); GLNX Corporation (GNLX); and Tate & Lyle Ingredients Americas, Inc. (“Tate & Lyle”). NAFCA and the identified individual members are collectively referred to herein as “Complainants.”

Exhibit No. 9, the Verified Statement of Prof. George H. Borts ("Borts"), each of which statements hereinafter shall be referred to by the preface "V.S."

### **I. PRELIMINARY STATEMENT**

Railroads have been withdrawing steadily from the business of supplying freight cars for use in connection with their rates and services and have been relying increasingly on their customers to supply the cars. Since 1980 alone, Class I railroads have cut approximately in half the percentage of all freight cars they supply, while the percentage of total cars supplied privately has slightly more than doubled. Class I railroads now supply only 37% of all freight cars, while private cars account for 53%. Two types of cars reflect the highest percentage of private car ownership: tank cars, of which railroads supply none for revenue use, and covered hopper cars, of which Class I railroads currently supply 30% and private car owners supply 64%. Shippers using private cars are not opportunistic volunteers. They do so because they find rail transportation to be essential to them in the first instance, and then become doubly subject to rail market power when private cars are acquired because the cars' extremely high costs of acquisition compel shippers to utilize their car investments.

In early 2001 BNSF announced a new policy to take effect on July 1, 2001 (the "July 2001 Changes"), under which it would impose new charges for holding empty private cars on railroad tracks prior to loading. Previously, BNSF had held such cars on its tracks at no charge in addition to the freight rate.

BNSF's July 2001 Changes were not applicable to BNSF-controlled cars and in many respects set the handling of private cars apart from the handling of empty railroad cars on BNSF for the first time. Within the BNSF system, as within the systems of other

railroads, railroad owned or controlled cars are classified for operating purposes pursuant to a series of codes established by the Association of American Railroads ("AAR"). These include category codes for cars that are assigned to specific shippers for loading at specific origins. Cars in these specific shipper origin pools (known as "C" pools) are routed by BNSF when made empty to the assigned shipper's designated loading origin. Once they arrive at the origin station, they can remain there indefinitely, at no charge to the shipper for whose benefit the cars are assigned, unless and until the cars are ordered by the shipper for a specific "want date," are placed on or after that want date, and then not accepted by the shipper. Only at that point do the cars fall under the carrier's demurrage rules.

Prior to BNSF's July 2001 Changes, empty private cars on BNSF were accorded similar treatment to the "C" pool carrier cars described just above. When a private car was unloaded, it was returned to a pre-designated loading station to await an order by the shipper to have the car placed for loading. No charge was payable if the car was held on BNSF track awaiting the placement request. These rules were consistent with the fact that BNSF provided highly erratic service, with no predictability as to when an empty private car would arrive at a loading point.

Under the July 2001 Changes, however, the empty private car is still returned to the pre-designated loading station as required by tariff, but BNSF has now decreed that, without any prior notice of when the car will arrive, or any opportunity for the shipper to request return of the car to a loading station on a "want date," the shipper must be prepared to accept the empty car onto its industry track within as little as a fraction over one day of arrival, or incur holding charges of up to \$50 per car per day. Not only is the pri-

vate car shipper unreasonably held to a different car supply rule than the railroad car shipper; the amount of free time allowed by BNSF before private car holding rules take effect is less than "C" pool cars enjoy on average before they are spoken for by a shipper. Empty TTX and Railbox cars controlled by BNSF while on its system likewise are accorded several days' free holding by BNSF without placement orders by shippers. BNSF's July 2001 Changes accord inferior treatment to private cars.

To a great extent, the practices imposed on private car shippers by the July 2001 Changes rest on BNSF's unreasonable assumption that it is entitled to demand of its private car shippers a higher standard of fleet management than BNSF itself delivers. BNSF's rules unlawfully make shippers pay for defects in BNSF's performance. BNSF's transit times for both loaded and empty cars – but especially for empty cars – are erratic and undependable, causing shippers to add cars to their fleet in order to avoid plant shut-downs and delivery defaults. Sometimes this may result in accumulations of empty private cars at a loading station.

Having caused these problems, BNSF could remedy them in at least one of two ways. First, it could improve its performance, enabling shippers to maintain smaller private car fleets and operate their cars more efficiently. Second, BNSF could provide storage on BNSF track at no charge, as it used to do for private cars, and as it still does for railroad equipment. Instead, BNSF unreasonably demands that its customers assume essentially all the consequences of unpredictable BNSF service simply because they, and not BNSF, now supply most of the cars.

For purposes of imposing empty private car holding charges, BNSF has divided private cars into two categories; covered hopper cars handling grain and grain products,

for which the empty car charges are published in BNSF Demurrage Book 6004, and all other private cars, including tank cars, which are subject to “storage” charges published in BNSF Storage Book 6005. Even though private covered hopper cars and tank cars are in many instances loaded by the same shipper at the same facility (particularly so in the case of NAFCAs shipper members), the July 2001 Changes of BNSF, initially and as since amended, set substantially different provisions for the agricultural covered hopper cars versus all other types of cars.

The agricultural covered hopper cars are subject to different free time calculations than the other cars (as discussed in greater detail below) and different daily charges. There is a uniform demurrage rate of \$50 per car per chargeable day for agricultural covered hopper cars, but cars subject to storage provisions pay \$25, \$15, or \$10 per car per day depending on the location at which the storage charges accrue. BNSF has established these three tiers of storage charges because it asserts that congestion on its system is “most likely” to accrue where it has set \$25 per day charges, is “likely” to accrue where there are \$15 per day charges, and is “less likely” to accrue where there are \$10 per day charges. The result is that an empty private covered agricultural hopper car can accrue demurrage at the rate of \$50 per day, while an empty private tank car belonging to the same shipper, occupying an adjacent space on the same BNSF track on the same day, may only be causing enough “congestion” to warrant a \$10 storage fee. Even if empty car holding charges were justified at all — which clearly is not the case — it makes no sense to conclude that an empty covered hopper car is five times more likely to contribute to “congestion” than a tank car at the same time and place.

Shortly after BNSF announced its July 2001 Changes, it acknowledged that not all of its customers might be able to accept their empty private cars within the new free time restrictions. BNSF planned to deal with such conditions in two ways. First, it openly pressed shippers to construct new holding tracks within their own industry confines, stating in its public announcement of the July 2001 Changes that such actions would "effectively expand [BNSF] capacity without additional capital outlays." BNSF offered to apply holding charges accrued against private cars in 2001 toward a shipper's cost of constructing these new tracks. Where track construction costs exceeded the 2001 accrued holding costs, there was no reimbursement for the excess; nor are the shipper's track maintenance costs reimbursed.

The law clearly requires that, when a carrier authorizes or compels a shipper to furnish services or instrumentalities of transportation – and holding tracks for empty cars fall within the statutory definition of transportation – appropriate compensation must be paid to the shipper. BNSF is not only failing to compensate those private car shippers compelled by BNSF policies to construct additional private track or acquire track through lease from BNSF, but is in fact abusing its market power over private car shippers by extracting their funds for the expansion of BNSF capacity.

A second alternative offered by BNSF was to lease BNSF tracks to shippers, in effect making them into "floating" private track at any point on BNSF property designated from day-to-day by BNSF. These leases were at rates higher than then-prevailing track lease rates, and the leases are cancelable on 30 days' notice. They bring about no improvement in alleged "congestion," as cars held on leased track are in exactly the same

BNSF yards as prior to the July 2001 Changes, only now BNSF realizes additional track rental revenue.

There has been resistance to BNSF's position by private car shippers in part because of erratic and unpredictable BNSF service seen by shippers as being responsible for private car additions made necessary to compensate for poor service. Faced with claims that it take responsibility for its own poor service, BNSF has been defiant. In response to shippers who point to BNSF's website train schedules as offering transit times that range from three days to seven days between the same two points, depending on the day of the week the shipment originates, BNSF's answer is that these shippers should consider curtailing production except on those days when BNSF offers the most favorable transit times. When otherwise challenged regarding its service failures, BNSF's response was that shippers who find BNSF service to be below par should consider closing their facilities or moving them. No railroad with anything other than extreme market power could take such extreme positions.

In pleadings filed in a related proceeding,<sup>2</sup> BNSF advanced several reasons in purported justification of its July 2001 Changes. None of them hold water.

The first was that the new empty car holding charges were necessary to remove “congestion” from BNSF’s lines. The term “congestion” was never defined, but BNSF provided examples of conditions which, according to BNSF, demonstrated that empty private cars were impeding the use of its facilities. The primary example offered by BNSF Witness Douglas W. Langston, General Director of Demurrage, Storage and Extended Services, was the assertion that “on April 30, 2001, there were 2,686 empty pri-

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<sup>2</sup> Docket No. 40260, North America Freight Association – Protest and Petition for Investigation – Tariff Publications of the Burlington Northern and Santa Fe Railway Company (“Docket No. 42060”).

vate cars sitting on BNSF's tracks, taking up over 31 miles of BNSF track space ... at the same location for more than 30 days.”<sup>3</sup>

Documents produced by BNSF through discovery in this proceeding show that empty railroad-controlled cars actually were stored on BNSF tracks in far greater profusion than empty private cars. As of April 30, 2001, there were a total of        service-able empty cars that had been held on BNSF track for more than 30 days. If as many as 2,686 of those cars were private cars, then        were carrier cars taking up        miles of BNSF track space. BNSF has since conceded that it is impossible for it to determine whether an empty private car rather than an empty railroad car is causing “congestion,” whatever “congestion” may mean. In statutory terms it is manifestly unreasonable for BNSF to single out certain private cars as the culprit of “congestion” on its system and to apply holding charges against just those cars and the shippers who operate them.

BNSF went on to argue that it intended to improve train velocity and operating performance generally through the July 2001 Changes. Using the metrics accepted by the railroad industry and the Board for railroad performance, the July 2001 Changes did not improve BNSF operations. In every metric category – train velocity, on-time performance, terminal dwell time, and cars on line – BNSF performance either deteriorated or showed marginal change at best between 2001 and 2004. On-time performance fell from 89% to 82%. Even if the July 2001 Changes prompted some shippers to order in empty private cars from BNSF tracks more quickly than previously, there is absolutely no proof that any such changes have brought about actual improvements in BNSF's service.

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<sup>3</sup> Docket No. 42060, Verified Statement of Douglas W. Langston, submitted June 9, 2003 (“Langston, V.S.”), p. 2. Mr. Langston also submitted a Reply Verified Statement in that case (“Langston, R.V.S.”). Both documents, as well as other relevant materials identified below, are being submitted herewith to the Board for its convenience in Volume II of Complainants' Opening Statement.



It is evident that BNSF did not aim the July 2001 Changes mainly at bringing about meaningful improvements in the metrics of BNSF operating performance, and that BNSF had other goals in mind when it instituted those changes. The record, discussed in more detail later, shows that, in addition to intending that the July 2001 Changes coerce shipper investment in track infrastructure to replace BNSF's own investments, BNSF desired to use the July 2001 Changes to "lever" its customers into new track leases at higher rental rates or contracts that would give BNSF assured business levels at premium rates.

The use of BNSF's obvious market power over its private car customers to lever more favorable business arrangements than it otherwise would be able to negotiate must be seen as an abusive and improper use of demurrage and storage charges. Where a carrier desires a shipper to change its business practices to the mutual benefit of carrier and shipper, it should negotiate those changes or offer tangible benefits in return, as BNSF has done in encouraging the development of its grain shuttle train programs. BNSF did not first approach the complainant shippers to offer compensation for their construction of additional holding tracks where such steps were feasible; BNSF instead announced the July 2001 Changes and then set about to offer its customers alternatives intended to increase BNSF revenues or substitute shipper investments for BNSF's own capital outlays.

Complainants have made several efforts to reach a private resolution of their differences with BNSF, but obviously to no avail. It is unlawful in the circumstances of this case for BNSF to assess holding charges against empty private cars, particularly where no such charges apply to empty railroad cars. BNSF also may not lawfully compel shippers to furnish track instrumentalities of transportation without compensation.

It is one thing to express concern over the use of BNSF track to hold empty private cars for 30 days or longer, and another to establish rules that impose penalties for such storage after just a fraction over one day's track use. BNSF's views are extreme and its rules manifestly overreach, particularly given the fact that there is no demonstrated basis for asserting that only private cars are responsible for "congestion" on BNSF and that the erratic nature of BNSF service plainly does not warrant or permit the imposition of the very narrow free time windows afforded by the July 2001 Changes. BNSF's own cars, particularly those that BNSF has placed in certain types of assigned service pursuant to AAR rules, are held by BNSF for unlimited days either at staging points throughout the BNSF system awaiting movement to loading stations, or at the loading stations themselves awaiting placement requests by BNSF's customers.

If BNSF's empty private car charges are not entirely set aside, treatment of private cars and railroad cars should be equalized. Railroad cars in assigned service are held empty on BNSF track until ordered in for loading between two and three days per car. BNSF holds empty TTX and similar cars for five days or more without charge to any customer, during which period the car can be ordered for loading and following which BNSF can request TTX to reassign the car. Empty private cars become subject to demurrage or storage tariffs if they arrive at the loading station and are not immediately accepted by the shipper. BNSF should at a minimum allow private cars the same privileges as rail-controlled cars receive prior to the commencement of any chargeable conditions.

## **II. HISTORY OF THE CASE**

The July 2001 Changes became effective on July 2001, 2001 and triggered two avenues of challenge. First, on June 26, 2001, in Docket No. 42060, NAFCA filed a Protest and Petition for Investigation of the changes as applied to tank cars only, seeking to invoke the mandatory investigation provisions for "departure tariffs" within the meaning of Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2d 196 (1986), 7 I.C.C. 2d 645 (1991) ("Ex Parte No. 328"). Numerous individual shippers making use of tank cars, and shipper organizations, filed petitions to participate in the proceeding. Separate but parallel claims were asserted (a) in Docket No. 42061 that the July 2001 Changes of BNSF and (b) in Docket Nos. 42062 and 42064, that the then-similar provisions published by Union Pacific Railroad Company ("UP") contravened Ex Parte No. 328. The petitions in Docket Nos. 42061, 42062, and 42064 were resolved privately over time. As part of the resolution of Docket No. 42064, UP agreed with NAFCA to exclude all private cars handling grain and grain products from its empty car holding changes, although reserving the right to charge its position with six months' notice.

Because Docket No. 42060 applied only to tank cars, and because it was not known whether the Board would institute an investigation of the July 2001 Changes pursuant to the provisions of Ex Parte No. 328, NAFCA and 11 of its individual members filed a complaint in this proceeding on August 29, 2001. The complaint, summarized briefly above, was intended to apply to the July 2001 Changes insofar as all types of private equipment other than tank cars were concerned; and also to tank cars in the event the Board denied petitions for the institution of an investigation under Ex Parte No. 328.

On October 5, 2001, BNSF moved to dismiss the complaint in this case. Contemporaneously, the Board, in Docket No. 42060, directed the parties to seek negotiated resolutions of their differences. Complainants filed a reply resisting the motion to dismiss the Complaint and counsel for Complainants and BNSF undertook negotiations as directed by the Board. After agreeing to amend its tariffs so that its new charges would not apply to empty private cars awaiting movement into repair facilities, BNSF reached agreements with other intervenors in Docket No. 42060 that had either limited interests in the case or members with interests different from those of NAFCA. Counsel for Complainants and BNSF met on several occasions to pursue negotiations as directed by the Board, but were unable to resolve the dispute. As discussed below, however, BNSF made certain unilateral alterations to July 2001 Changes.

By October 2002, there had been no decision by the Board in response to the petition in Docket No. 42060 for the institution of an Ex Parte No. 328 investigation and no decision by the Board with respect to BNSF's motion to dismiss the complaint in this proceeding. On October 9, 2002, NAFCA, joined by National Industrial Transportation League ("NITL") and American Chemistry Council ("ACC"), which had intervened in both Docket No. 42060 and in this proceeding, requested the Board to take action in both cases. The Board responded by issuing a decision on April 28, 2003 directing the remaining parties in Docket No. 42060 to submit additional comments. Such comments were filed by BNSF and jointly by NAFCA, NITL and ACC.

On August 13, 2004, the Board issued a Decision concluding that BNSF's July 2001 Changes, as by then amended, were not subject to investigation under Ex Parte No. 328. In that Decision, the Board also denied BNSF's motion to dismiss the complaint in

this proceeding. As a result of the Board's August 13, 2004 Decision, this proceeding went forward as a complaint involving the application of the July 2001 Changes to all types of private equipment, including tank cars.

Subsequently, the Board issued a procedural order providing for written discovery, written objections to discovery, oral depositions, and the submission of pleadings. At the joint request of the parties, a Protective Order also was issued by the Board. BNSF and Complainants have exchanged written discovery, objections, and availed themselves of the services offered by the Board to provide staff assistance in resolving discovery impasses. Complainants took the deposition of BNSF's Douglas W. Langston on May 17 and 18, 2005. The transcript of that deposition hereinafter will be referred to as "Langston Dep. Tr.," and deposition exhibits will be referred to hereinafter as "Langston Dep. Ex."

#### A. The Amended Complaint

As a result of positions advocated by BNSF in the course of discovery discussions with Complainants, it became clear that BNSF regarded the complaint filed on August 29, 2001 as insufficiently broad in scope to allow the affiliates and subsidiaries of named individual complainants to recover monetary damages. Complainants disagreed and took the position that where a defendant railroad has been dealing with individual shipper complainants' corporate families on an integrated basis for years as an ordinary and routine business matter, as is the case with one of the individual complainants pressing a claim for damages, and the corporate parent actually has paid the amounts in dispute on behalf of a subsidiary, Board authority and precedent support regarding the participating

parent company as an agent of its subsidiaries or affiliates for the purpose of pursuing a claim for monetary damages on behalf of the subsidiary.

Despite regarding BNSF's position as unmeritorious, Complainants filed an amended complaint on March 14, 2005, as a safety measure in response to BNSF's contentions regarding the availability of damages. The crucial difference between the amended complaint and the initial complaint is that the amended complaint states expressly that the complaint includes the "subsidiaries and affiliates" of the individually-named complainants.<sup>4</sup> In a letter of March 14, 2005 to the Board accompanying the amended complaint, Complainants explained that, even if the Board were to take the incorrectly narrow view of the original complaint espoused by BNSF, the amended complaint would preserve the right of the named complainants to seek monetary damages on behalf of corporate subsidiaries and affiliates for two years prior to the filing of the amendment, pursuant to 49 U.S.C. 11705(c).

Claiming that Complainants' letter of March 14th to the Board, accompanying the amended complaint, amounted to a Motion for Leave to File the amendment, BNSF filed a so-called "reply" in opposition on April 1, 2005. Complainants responded, pointing out that their March 14 letter had not been a Motion inasmuch as 49 C.F.R. § 1111.2, pursuant to which the amended complaint was filed, contains no requirement to obtain leave of the Board to amend a complaint, and that the letter merely constituted an explanation of the reasons for the amendment. Complainants also pointed out that it would be premature for the Board to rule on the amendment issue before deciding questions of lawful-

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<sup>4</sup> Eleven individual members of NAFLA joined in the original complaint but one determined no longer to participate in that capacity. Two of the individual complainants named in the amended complaint and identified in footnote 1, supra (ConAgra and Tate & Lyle) are successors by name change to parties named in the original complaint.

ness. The Board has not ruled on the amendment issue, which will be addressed further in a later section of Complainants' argument.

### **III. STATEMENT OF FACTS**

#### **A. Complainants**

NAFCA is an unincorporated association whose members manufacture, are lessors of, or who operate private freight cars, and was formed to further the interests of private car manufacturers, lessors, owners, and operators. It currently has 24 members who collectively own or operate over 500,000 private freight cars, equaling some 73% of all private cars, 39% of all freight cars in the U.S., and more cars than are registered to all U.S. Class I railroads combined. (Mack V.S. ¶ 2).

As explained in their Verified Statements, seven of the individually-named complainants are shipper members of NAFCA. Three individually-named complainants<sup>5</sup> are lessors of freight cars to shippers and were especially concerned about the indirect impacts of the July 2001 Changes. Because, as lessors, they do not operate facilities at which private cars are loaded, they have not submitted Verified Statements. Six of the seven shippers whose Verified Statements are attached originate private car shipments on BNSF. The seventh, Tate & Lyle, is a substantial user of private cars on other major railroads and believes that an extension of the rigid provisions of the July 2001 Changes to other railroads would result in unmanageable restrictions on the use of private cars.

#### **B. Freight Car Ownership**

Class I railroads have been withdrawing steadily from the business of freight car supply and transferring that duty to their customers. This trend began before 1980, but has accelerated since then. Between 1980 and 2004, Class I railroad freight car owner-

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<sup>5</sup> Chicago Freight Car Leasing Company, First Union Rail, and GLNX Corporation.

ship declined from 1,168,000 to 467,000 cars, while cars of private ownership increased from 441,000 to 687,000. In 1980, Class I carriers supplied 68 percent of all freight cars and private car owners supplied 26 percent; by 2004, the Class I contribution had dropped to 37 percent, while the private car contribution had increased to 53 percent. Mack V.S., ¶ 3.

The shipper-supplied fleet consists mainly of tank cars and covered hopper cars. Railroads, including BNSF, supply no tank cars for revenue service. In 2004, of 378,000 total covered hopper cars operating in the U.S., Class I railroads owned 30 percent, other railroads owned 7 percent, and private cars accounted for 64 percent. Six commodity groups rely on covered hopper cars and tank cars for more than 50 percent of their shipments; Farm Products; Food & Kindred Products; Chemicals & Allied Products; Stone, Clay & Glass Products; Petroleum & Coal Products; and Hazardous Waste. *Ibid*, ¶¶ 4, 5.

BNSF asserted recently that it supplied no tank cars because its customers preferred to supply their own. Langston R.V.S., p. 10. BNSF does not require shipper permission to furnish tank cars, any more than BNSF requires shipper permission to furnish other types of cars. If it made economic sense to BNSF for it to furnish tank cars, the Board can rest assured that BNSF would do so. It does not furnish tank cars for the very practical reason that tank cars furnished by a carrier would require frequent diversion to cleaning tracks between loads, adding extra expense and delay. When shippers control their own tank cars, there is less need for car cleaning because they can be assured that the prior load is compatible with the car's next load. Mack V.S., ¶ 7. The fact that neither it nor any other railroad furnishes any tank cars establishes that BNSF, like other carriers, prefers not to supply tank cars, regardless of shipper preferences.



Shippers supply covered hopper cars for loading on BNSF for a number of other compelling reasons. First, where BNSF does operate freight cars, it sizes its fleet to meet "average demand." Langston R.V.S. p. 5; Langston Dep. Tr. Vol. 1, pp. 74-75.<sup>6</sup> Shippers, on the other hand, acquire cars to keep their processing facilities running and their customers satisfied. Wallace V.S., ¶¶ 3, 7 ("Bunge ... does not make corn and soybean products to meet 'average' demand, but to meet actual market conditions, so that it is inevitable that Bunge will need more cars than a railroad such as BNSF is able to supply, even when it chooses to supply any of the necessary types"); Sims V.S., ¶ 9.

Second, BNSF refuses to allow its covered hopper cars to be used for the transportation of certain agricultural byproducts, notably dried distillers grain (a byproduct of ethanol production utilized as an animal feed ingredient) and mammalian byproducts. Voss V.S., ¶ 2; Sims V.S., ¶¶ 12, 17. Specialty covered hopper cars (air slide and pressure differential), used for the transportation of flour and corn products, are in short supply on BNSF, as are larger covered hopper cars used for soybean meal transportation. Wallace V.S., ¶ 6; Sims V.S., ¶¶ 5, 12. BNSF likewise discourages the use of its covered hopper cars for corrosive loadings such as those involving salt. Sims, *Ibid.* Shippers who acquire private cars are extremely reliant on rail service (e.g., Wallace V.S., ¶ 5). Because of the extremely high cost to either purchase or lease rail cars, shippers would not acquire those cars if it were not necessary for them to do so. Wallace V.S., ¶ 8; Neumayer V.S., ¶ 4.

BNSF maintains that its shippers have acquired and retained an excessive number of private cars for use on that railroad, ignoring the effects of its own service inconsisten-

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<sup>6</sup> All pages from the Langston Deposition Transcript referred to herein are included in Volume II of this filing.

cies. However, the fact remains that shippers cannot meet the goal of keeping their facilities operating unless their fleets compensate for BNSF's service unpredictability and variances. The extremely high costs of cars (over \$65,000 to purchase a new covered hopper, over \$95,000 to purchase a new tank car, and new rental rates of more than \$600 per month) act to insure that cars will not be added frivolously. *Wallace V.S.*, ¶ 6.

Sizing any car fleet, whether railroad or private, is not an exact science. If shipper fleets are going to keep shipper facilities operating, then the size of the shipper fleet will grow when carrier performance worsens. In the mid to late 1990s, railroad service throughout the country, including BNSF service, took a serious downturn following the round of consolidations that began with the Burlington Northern-Santa Fe merger. As service worsened, rail transit times worsened. And as rail transit times worsened, private car fleets had to be expanded to continue to move products needed by the industries that operated those cars. Even as service improved on one railroad, continued poor service on connecting lines had ripple effects because of interline movements that produced slower total car cycles than previously. Between 1995 and 2000, years of serious post-merger service problems, the private covered hopper car fleet grew from 152,000 to 227,000 cars, an increase of 50 percent. Neither those increases nor other increases in other segments of the private car fleet were made in expectation that private car operators would in any way be penalized if their empty cars resided on railroad tracks. *Mack V.S.*, ¶ 11.

Once a private fleet is expanded it cannot quickly be contracted. Most of the private fleet is operated by shippers as lessees. Most leases are for multiple years, often up to 15-18 years' duration. *e.g.*, *Voss V.S.*, ¶ 4. Long-term leases cannot simply be terminated, and cars subject to them returned to a lessor, should railroad service improve.

Sims V.S., ¶¶ 15, 18. It is rational to expect the marketplace to demand long term leases of shippers inasmuch as the market recognizes that shippers must maintain fleets to compensate for perpetually shallow railroad fleets. Borts V.S., ¶ 19. Shippers can, of course, reduce fleet sizes as leases expire and have in fact in many instances reduced covered hopper car inventories in response to increased carrier car supply. Mack V.S., ¶ 36; Voss V.S., ¶ 2

One of the most serious difficulties encountered by shippers in sizing their fleets and in maintaining those fleets for BNSF originations is the erratic and unpredictable nature of BNSF service. Unpredictable, erratic BNSF service is commonplace and widespread. Mack V.S., ¶ 21; Neumayer V.S., ¶ 6; Voss V.S., ¶ 5; Wallace V.S., ¶ 9. BNSF's own website provides an indication of just how inconsistent BNSF service can be between any two given points. BNSF offers as a customer tool a website quotation of estimated transit schedules. In April 2005, AGP sought the BNSF transit schedule from Dawson, MN, where AGP produces crude soybean oil, to Hastings, NE, where that oil is refined. The result of that inquiry is attached as Appendix A to Complainants' Exhibit No. 3. It shows that estimated BNSF transit times from Dawson to Hastings varied from 4 days 16 hours to 7 days 16 hours depending on the day of the week on which the shipment originated. Transit times were the same on only two days of the week. The BNSF website also cautions BNSF's customers that its estimated schedules should not be "relied upon". Voss V.S., ¶ 6.

In July 2005, AGP again consulted the BNSF website for estimated transit times between Dawson and Hastings. The result of that inquiry is attached as Appendix B to Complainants' Exhibit No. 5. By July, BNSF had shortened its transit times from Daw-

son to Hastings; on two days of the week the schedule is 4 days 16 hours; on three days of the week it is 4 days 19 hours; on one day it is 5 days 19 hours; and on the seventh day it is 6 days 19 hours. The spread between the shortest and longest transit times has been reduced from 3 days to 2 days. However, the reverse trip, used for empty tank cars returning from Hastings to Dawson, remains highly erratic. The shortest transit times, available on two days of the week, are 4 days 12 hours. On two other days, the trip takes 5 days 12 hours; on yet two more days the trip is estimated to take 6 days 12 hours; and on the seventh day it is scheduled to take 7 days 12 hours, representing a variance of 3 days on a 4-day trip. AGP's actual experience in 2004 showed that BNSF transit time on loads from Dawson to Hastings was from 2 to 14 days, while empties in the reverse direction took from 3 to 8 days. Voss V.S., ¶ 7. Notably, BNSF has changed its freight schedules approximately 5,700 times since May 2001. Langston Dep. Tr., Vol. 2, pp. 69-70.

AGP also obtained BNSF transit times between Manning, IA and Hastings from the BNSF website. Manning is another point at which AGP produces crude soybean oil. The results of that BNSF website search are attached as Appendix C to Complainants' Exhibit No. 3. In this instance, the estimated transit time from Hastings to Manning varies from 3 days 16 hours on a Tuesday to a high level of 5 days 16 hours on a Friday or Sunday, with varying other times on the remaining days. The return trip for empty equipment takes either 5 days 8 hours, 6 days 8 hours, or 7 days 8 hours, depending on the departure day of the week. AGP's records for 2004 show that actual transit times for loads from Manning to Hastings took anywhere from 2 to 8 days and empties moving over the reverse route took between 3 and 11 days. Voss V.S., ¶ 8.

ADM conducted a study that compared actual BNSF transit times between an ADM soybean oil processing facility at Havelock, NE and a customer at Redlands, CA between January and June 2005, encompassing all complete cycles between those two points over that period of time. The results, which ADM regards as symptomatic of BNSF service generally, show that actual BNSF performance per shipment varies substantially not merely from scheduled BNSF transit time, but from average performance levels between the same two points.

Appendix A to Complainants' Exhibit No. 2 consists of the estimated BNSF transit times between Havelock and Redlands as made available on BNSF's website. As was true with AGP's experience, ADM likewise found substantial variances in scheduled transit times depending on the departure days of the week. In this instance, transit time from Havelock to Redlands was scheduled to take from 7 days to 8 days, but the return trip used by ADM for empty tank cars was scheduled to take anywhere from 8 days 5 hours to 12 days 5 hours, a 50% variance.

Appendix B to Complainants' Exhibit No. 2 compares ADM's actual transit experience with BNSF's estimated transit schedules and relates actual transit experience per trip to average transit time for all complete trips. The analysis shows that estimated scheduled transit time from Havelock to Redlands was 7.2 days on average versus actual average transit time of 9.98 days, so that actual performance per trip was approximately 2.5 days longer than scheduled performance. For the empty return movement, the BNSF schedule estimated 9.77 days versus an actual average of nearly 14 days. When each load-empty cycle is combined, there is a net average variance of 5.06 days per cycle from the average transit time for the load-empty pairs and of 6.92 days from BNSF's web-

site schedules. Average loaded trip length time exceeded average performance on occasions and empty returns exceeded average performance on occasions. Actual loaded transit times exceeded BNSF estimated transit times in each and every instance, and empty actual transit times exceeded BNSF estimates in out of the trips. Neumayer V.S., ¶¶ 6-13.

Remarkably, BNSF believes that it is up to its shippers to find a way to cope with BNSF's erratic and unpredictable service. BNSF testified that shippers should give "consideration" to having "their plants produce goods on the days when [BNSF's] transit times are lower."<sup>7</sup> Shippers should thus, according to BNSF, produce goods for shipment on only one or two days a week when BNSF schedules the shortest transit times, and force their production facilities to be unproductive on all other days just to take advantage of a scheduled BNSF transit time that BNSF has warned its customers not to rely on. No competently managed shipper could possibly give serious consideration to this preposterous proposal.

BNSF takes an equally extreme and even more alarming position with respect to how its customers should react to erratic BNSF service, suggesting that shippers consider terminating production, shutting down their plants, or relocating their plants. These views were expressed by Mr. Langston in the following deposition exchange:

Q. (By Mr. Goldstein): What should a shipper do when it's faced with worsening service on a railroad in terms of sizing a private fleet? Get more cars, is that one rational response?

A. (By Mr. Langston): There's a lot of responses.

Q. (By Mr. Goldstein): Is that one rational response?

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<sup>7</sup> Langston Dep. Tr., Vol. 2, pp. 67-68.

A. (By Mr. Langston): I don't know if it's rational or not. I mean, you're asking these questions – I – is it rational, I don't know.

Q. (By Mr. Goldstein): You don't know that its irrational, do you?

A. (By Mr. Langston): I don't know what it is. I mean, there's a lot of things you can do. You can truck it. You cannot produce. You can shut down. You can produce more. You can move your plant. You can – <sup>8</sup>

BNSF's astounding views of how BNSF's shippers should react to BNSF's service inadequacies display a complete indifference to one of the root causes of private car fleet sizes, BNSF's own service inconsistencies. Its outlook also is relevant to the central question of whether private car holding charges that are incurred as a result of unpredictable and erratic BNSF service are reasonable and lawful, as addressed below.

### C. The July 2001 Changes, Then And Now

Until July 2001, rates charged by BNSF for the movement of goods in private cars allowed the use of BNSF trackage to hold empty private cars prior to loading for no extra charge in addition to the freight rate. The great majority of the private cars in existence and in use on BNSF were acquired when it was understood that shippers would furnish private cars and railroads, including BNSF, would supply tracks on which to hold those cars so long as they were empty awaiting loading, all as part of BNSF's freight rate. Mack V.S., ¶ 10.

Those of the July 2001 Changes applicable to empty covered hopper cars used for the transportation of grain and grain products were published by BNSF in its Demurrage Book 6004-A, Items 1040 and 1100. Under Item 1040, demurrage is to be computed from the first 12:01 a.m. after constructive placement, with Sundays regarded as a non-

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<sup>8</sup> Langston Dep. Tr., Vol. 2, pp. 72-73.

chargeable day pursuant to Item 140. One debit accrues for each demurrage day. Covered hopper cars handling grain and grain products are accorded two credits per car under Table 1 of Item 1100. For each shipper location there is an end-of-month tally of debits and credits. As of July 2001, 2001, there was a charge of \$25.00 per debit day. BNSF's practice has been to adjust its demurrage rates on grain cars seasonally, and the debit day charge was scheduled to increase to \$75.00 as of August 1, 2001. Under the Demurrage Book, there is no relief from carrier bunching for empty cars awaiting loading. Mack V.S., ¶ 14.

For tank cars, and certain other private equipment besides covered hopper cars handling grain and grain products,<sup>9</sup> the July 2001 Changes appear in BNSF Private Car Storage Book 6005, Item 1300. Under that provision, storage charges are to be assessed from the second 12:01 a.m. after constructive placement, with the first Saturday and Sunday excluded. On July 2001, 2001, there was a rate of \$25.00 per chargeable day. Under Item 3100, there is limited relief for charges resulting from carrier bunching, as specifically defined in that item. Mack V.S., ¶ 15.

There have since been changes to both the demurrage and storage provisions. BNSF's Demurrage Book charge per debit day for empty private cars is now \$50.00 per car. In April 2002, BNSF allowed one free diversion per car, and changed the empty car charges applicable under its Storage Book, adopting a 3-tier approach; a charge of \$25.00 per day in areas where BNSF deemed track congestion to be "most likely," \$15.00 per day in areas where BNSF deemed congestion to be "likely," and \$10.00 per day in areas where congestion is "least likely." BNSF also added a single credit if BNSF receives a line-haul movement from the empty private car that it held on its tracks. Mack V.S., ¶16

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<sup>9</sup> The July 2001 Changes did not apply to all private cars. Langston, Dep. Tr., Vol. 1, p. 18.



and Appendix B thereto. See, also, Langston V.S., p. 8. BNSF testified that it was "pretty comfortable ... that these 10, 15, \$25 differentiations do reflect reliable differences in congestion on the railroad." Langston Dep. Tr. Vol. 1, p. 54.

The disparities between the Demurrage Book and Storage Book rules and rates lead to various anomalous applications of demurrage and storage charges. For example, if an empty private covered hopper car intended for grain or grain product transportation is constructively placed on a Sunday, Monday, Tuesday, Wednesday or Thursday, the car will have two available "credit," or free, days. For such a car placed on Sunday, the first debit day will occur on Wednesday. On the other hand, if the car is an empty tank car, whether intended for grain product transportation or otherwise, if constructively placed on Sunday, it can incur chargeable days beginning with Tuesday. These disparate programs apply even if the Demurrage Book and Storage Book private cars are held in the same BNSF yard at the same time for the same shipper. Mack V.S., ¶ 17.

If empty covered hopper cars transporting grain or grain products incur demurrage, they are charged at the rate of \$50.00 per day at the present time. If another type of empty private car incurs storage charges at exactly the same point, the rate will be either \$10, \$15, or \$25 per day depending on geographic location. See Appendix B-2 of Mack V.S. At Complainant Bunge's facilities at Island Park, IA, tank cars incur a \$10 per day charge; at its facilities at Crete, NE, tank cars incur a \$15 per day charge; at its facilities at Emporia, KS, tank cars incur a charge of \$25 per day; yet a covered hopper car incurs a charge of \$50 per day at all three points. Wallace V.S., ¶ 15. In, for example, Iowa, where the storage charge is \$10 per day for a tank car because BNSF considers congestion at that point to be "least likely," BNSF seems to think that an empty private covered

hopper car, for which the daily demurrage rate is \$50, either has no impact on "congestion" or causes five times as much congestion as the tank car held on the same track at the same point at the same time.

All of these imbalances in holding charge applications contradict BNSF's own analysis of "congestion" on its system. BNSF recognizes that no one car causes more "congestion" than any other car. As stated by Mr. Langston at his deposition:

Q. (By Mr. Goldstein): Is congestion determined at all by particular car type? Do some car types tend to create more congestion than others?

A. (By Mr. Langston): In terms of congestion from an operating standpoint, congestion's (sic) a car's a car's a car.<sup>10</sup>

If there is a valid congestion-related measure of empty holding charges, it has been ignored by BNSF where covered hopper cars handling grain and grain products are concerned.

D. BNSF's "Congestion" Rationale For The  
July 2001 Changes Is Hollow

The July 2001 Changes ostensibly were aimed by BNSF at reducing "congestion" claimed to be caused by empty private cars and in turn at improving BNSF operating characteristics such as train velocity and yard time (terminal dwell). Langston V.S., pp. 2-3. As it turned out, if those were BNSF's goals at all, they were by no means BNSF's only motives. In reality, BNSF was seeking to expand its infrastructure for its own benefit and the benefit of its entire customer base at the expense of its most highly captive shippers, and attempting to use the threatening new charges to "lever" traffic and rate concessions from those shippers.

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<sup>10</sup> Langston Dep. Tr., Vol. 1, p.54

From all available evidence, there is no indication that there was "congestion" on the BNSF system at the time the July 2001 Changes were imposed or, if there was, that private cars were the sole or even primary cause. Nor is there any indication that the July 2001 Changes brought about improvements in train velocity, terminal dwell time, or on-time performance by BNSF; to the contrary, BNSF service has deteriorated since 2001 by those measures. BNSF intended to use the July 2001 Changes to "lever" concessions from its customers and what occurred was that BNSF's private car shippers were maneuvered into constructing, often at their own expense, track infrastructure that benefits BNSF and its entire system, and into leasing tracks from BNSF at rentals in excess of what BNSF had been receiving before institution of the July 2001 Changes.

i. Singling Out Certain Private Cars As The Cause Of "Congestion" On BNSF Is Without Foundation and Unjustified

On April 30, 2001, the date on which BNSF said there were 2,686 empty private cars that had been sitting on BNSF's track at the same location for more than 30 days, taking up more than 31 miles of BNSF's track space, and causing congestion,<sup>11</sup> there were in fact        total cars in stored, serviceable condition on BNSF that had been in that status for more than 30 days.<sup>12</sup> If 2,686 of those were private cars, then the balance, or       , were carrier cars, and those carrier cars were taking up 58 miles of BNSF track. In total, on April 30, 2001, there were        "stored serviceable" cars on BNSF (for periods of one day or more). Of that number,        were tank cars (and arguably all private cars),        were identified as private covered hopper cars, and        were identified as private cars at repair shops – a total of        cars. *Ibid.* Eighty percent of all stored cars on

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<sup>11</sup> Langston V.S., p. 2.

<sup>12</sup> Langston Dep. Tr., Ex. 21. Deposition exhibits referred to herein are contained in the Ancillary Materials Volume.

BNSF on April 30, 2001 appear to have been cars either of BNSF ownership or under its operating control.

BNSF knows full well that it cannot point to any system-wide group of "stored" cars and claim that only the private cars among them are causing "congestion" on BNSF. Asked whether, of the plus cars in serviceable storage status on April 30, 2001, only the private cars were causing congestion, Mr. Langston stated, "No".<sup>13</sup> As we have already pointed out, BNSF recognizes that, where congestion is concerned, "a car's a car's a car." It was simply not legitimate for BNSF to single out a sub-class of private cars and act as if they alone were responsible for BNSF's "congestion."

Reinforcing the conclusion that BNSF's operating difficulties should not be blamed entirely or even largely on private cars is the fact that, after the July 2001 Changes took effect, BNSF operating performance worsened in terms of normal operating measurement metrics, despite the fact that Mr. Langston asserted that the July 2001 Changes brought about a significant reduction in empty private cars held on BNSF for more than 30 days. See Langston V.S., p. 5. If private cars had been the sole or primary cause of "congestion," then BNSF's operating metrics should have improved after the July 2001 Changes were put into effect.

Mr. Langston testified that the July 2001 Changes were intended to improve velocity and reduce terminal dwell time to result in greater system fluidity. Langston Dep. Tr., Vol. 1, pp. 81-82. However, measured by those standards, the July 2001 Changes failed. BNSF data shows that, between 2001 and 2004, BNSF on-time performance fell from a monthly average of 89 percent to 82 percent. Average monthly train velocity in 2004 was less than one mile per hour faster than in 2001. Terminal dwell time (the aver-

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<sup>13</sup> Langston Dep. Tr., Vol. 2, pp. 22-23.

age time a car spends within an operating yard) rose from 26.3 hours in 2001 to 29.8 hours per occasion in 2004.<sup>14</sup>

It may well be that the July 2001 Changes caused many shippers to endeavor to order empty private cars from BNSF track into shipper loading tracks more quickly than before the changes took effect. BNSF claims that the July 2001 Changes were responsible for reducing the time spent by empty private cars on BNSF track by about one day between 2001 and 2003. Langston V.S., p. 5. However, when the July 2001 Changes took effect, BNSF, as discussed below, aggressively sought to have its customers lease yard trackage from BNSF. Once leased, the trackage is treated as private track, and cars on that track would be excluded from any calculation of time spent by private cars on BNSF trackage. Similarly, if shipper cars in 2003 were on industry track that had been built as a result of BNSF's urgings, those cars also would have been excluded from BNSF's calculations. BNSF may believe that the use of the July 2001 Changes to bring about both leases and industrial track construction shows the success of the July 2001 Changes. Complainants believe these track additions and leases evince a coercive combination of BNSF's formidable market power over its private car shippers and its ability to misuse a common carrier tariff to impose its will.

ii. Other Purposes Of The July 2001 Changes

BNSF used its power to publish a tariff as a means of coercing shipper behavior that BNSF could and did not achieve through arm's length negotiations. BNSF's initial announcement of the July 2001 Changes contained the following statement:

The intent of these changes is to improve utilization for our customers and effectively expand capacity without additional capital outlays.<sup>15</sup>

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<sup>14</sup> Langston Dep. Ex. 13.

The "additional capital outlays" that BNSF hoped to avoid were its own capital outlays, while transferring those costs to its customers. BNSF made it clear from the outset that if its customers wished to avoid the holding charges, they should construct additional track capacity on their own industrial property. This effort to pressure shippers to build additional trackage at their expense, whether or not they desired to do so, was described by BNSF itself as an effort to "incent corrective behavior when shortcomings are identified," a description which appeared in a BNSF handout at a shipper forum on private equipment. Mack V.S., ¶ 25 and Appendix C. At the very time it was adopting a policy of pressuring its shippers to build additional holding track, BNSF was also embarked on a program of retiring its own switching and siding tracks,<sup>16</sup> which are the types of tracks used to hold empty cars.<sup>17</sup>

BNSF did offer limited reimbursement to shippers who constructed additional industry trackage in the form of a credit for empty car holding charges accrued in 2001 against the cost of new track construction. However, if track construction costs exceeded accumulated empty car charges for 2001, the excess cost was to be borne by the shipper, and all ongoing maintenance likewise was to be at shipper expense. Mack V.S., ¶ 26. Shippers constructed industrial trackage at costs well in excess of those reimbursed by BNSF. Voss V.S., ¶ 13; Neumayer V.S., ¶ 22.

In other circumstances, when BNSF has sought to convince its customers to make extensive capital investments in their facilities to improve operations for the mutual benefit of BNSF and the shipper, BNSF has offered positive incentives, such as reduced rates

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<sup>15</sup> Mack V.S., Appendix A.

<sup>16</sup> Langston Dep. Ex. 16. Between 2000 and 2004 BNSF had net retirements of 495 miles of siding, switching and yard track.

<sup>17</sup> Langston Dep. Tr., Vol. 1, pp. 155-57.

and construction contributions, as BNSF did when it desired to expand its grain shuttle train program. *Sims V.S.*, ¶ 6. BNSF pays allowances to those of its customers who perform their own switching, prepare bills of lading and freight billing, and for use of private cars. *Langston Dep. Tr.*, Vol. 2, pp. 79-81. Had BNSF elected to take a similar approach toward additional industry trackage by conferring with shippers to arrive at mutually satisfactory terms for the construction and maintenance of that trackage, the shippers would have listened to BNSF's proposals. *Voss V.S.*, ¶ 15; *Wallace V.S.*, ¶ 17. *Gustafson V.S.*, ¶ 6. BNSF instead published the July 2001 Changes to "incent corrective behavior," a euphemism for compelling captive customers to alter their business practices to suit the preferences of BNSF.

Many shippers have facilities at which track expansion is not feasible. *Mack V.S.*, ¶ 39; *Voss V.S.*, ¶ 12; *Wallace V.S.*, ¶ 11; *Sims V.S.*, ¶ 19. Expecting that outcome, or anticipating that there might be reluctance by some shippers to construct new track, BNSF made another goal of the July 2001 Changes an increase in yard trackage rentals and rental rates. This alternative to the new empty car holding charges was introduced by BNSF to its customers at a forum held on April 17-18, 2001. *Mack V.S.*, ¶ 26 and Appendix D. New track lease rates were contemplated at \$10, \$20, and \$30 per foot per year. *Ibid.* These rentals produce excessive annual rates of return ranging between 19 percent and 70 percent. *L.E. Peabody V.S.*, ¶ Table No. 3.

At the time the July 2001 Changes were announced, track lease rates were much lower. One shipper was faced with annual increases in track rental from \$     per track foot in 2001 to \$     per track foot over a period of several years. *Mack V.S.*, ¶¶ 27, 41; *Sims V.S.*, ¶ 19. See, also, *Hiser V.S.*, ¶ 4, disclosing track lease rates since 2000 of

\$5.50 to \$6.50 per foot per year with carriers other than BNSF in states where BNSF operates.

BNSF's efforts to bring about additional, more remunerative leases of BNSF yard track by shippers needing an alternative to BNSF's holding charges apparently met with considerable success. Numerous shippers leased trackage from BNSF under this program, e.g., Voss V.S., ¶ 13; Wallace V.S., ¶ 13; Sims V.S., ¶ 19; Gustafson V.S., ¶ 3. In 2001, BNSF had        feet, or        miles, of track under lease to shippers; in 2002,        feet (        miles); in 2003,        feet (        miles); in 2004,        (        miles).<sup>18</sup> While these leases enhanced BNSF's revenue, they did absolutely nothing to alleviate the "congestion" about which BNSF professed to be so concerned. All of the leases were "floating" leases, under which BNSF selected one or more positions in its yards on which to place the private cars. The cars simply remained in the same BNSF yards where they had been held before the July 2001 Changes took effect, Wallace V.S., ¶ 14, Langston Dep. Tr. Vol. 1, p. 150. The key difference was that now BNSF was collecting increased rentals. BNSF's leases also contain provisions placing liability for property or personal loss while using the leased tracks on the shipper. Wallace V.S., ¶ 13.

BNSF and its customers have different measures for the number of cars they supply. If BNSF supplies a car type at all, it does not claim to meet more than "average" demand, and leaves the riskier part of car supply – cars necessary to keep a plant operating despite inconsistent rail service – to the shipper. When BNSF concluded that its shippers' fleets were too large, but BNSF was unwilling to pay shippers the full cost of constructing industry holding track where feasible, BNSF decided that one purpose of the

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<sup>18</sup> Langston Dep. Ex. 14. BNSF was not always willing or able to lease track to shippers who requested it, e.g., Neumayer V.S., ¶ 23.



July 2001 Changes should be to "provide us a lever into the sizing of on-line privately supplied equipment fleets."<sup>19</sup> Shippers finding the July 2001 changes too costly would have to reduce their fleets.

BNSF desired to use the July 2001 Changes not merely as a "lever" to excise private cars from on-line BNSF positions, without full and adequate compensation to shippers who constructed their own tracks to hold those cars, but also to achieve other economic advantages that BNSF had not been able to achieve through unleveraged commercial channels. A February 16, 2001 email from Linda Crossley, a BNSF sales person, reporting her views of how the announced July 2001 Changes could be utilized by BNSF, stated:

Just like the deal, this is forcing them to build the storage tracks etc. they have been putting off doing for years. Then, we walk in, offer to help through allowances, which initially totally reimburses them for their costs, but – the big thing we get is long-term contracts. If we tie up competitive business at high margins for long years say 5+, and after the first year which we lose somewhat on it because that allowance is coming right off the top – sorta [sic] like interest rates on your car, the end result is seized business for the next 4, or hopefully in the case of , 6 years (that is long-haul and competitive).<sup>20</sup>

Use of the July 2001 Changes to leverage BNSF into more favorable shipping terms in 2000 and 2001 (when business was not as good for BNSF as it currently is) was manifest in other efforts. At a customer forum held by BNSF in March 2001 to discuss the July 2001 Changes, BNSF suggested the possibility of a new contract rate structure that might obviate the need for payment of empty car holding charges. The proposal entailed "guaranteed" contract service by BNSF at premium rates within defined shipping

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<sup>19</sup> Langston Dep. Ex. 9, Section 1.0 (page from BNSF Private Equipment Policy Statement dated May 1, 2001).

<sup>20</sup> Langston Dep. Ex. 11.

corridors. BNSF's customer, in return, would have to guarantee BNSF a certain volume of traffic in that corridor and pay a penalty if the volume guarantees were not met. The shippers present were not receptive to this concept because it involved undefined "premium rates" and penalty payments by BNSF for its non-performance that the shippers expected would be inadequate based on past BNSF practice. Mack V.S., ¶ 27; Voss V.S., ¶ 17.

One shipper was advised by BNSF that, if the shipper would reduce its overall tank car fleet by    percent, BNSF would reduce its minimum volume contract requirements for that shipper by approximately    percent. This proposal would have left the shipper with a smaller tank car fleet for use not just on BNSF, but on other carriers, with only a promise of a volume guarantee reduction on BNSF. The proposal was seen by the shipper as an attempt to require it to remove tank cars from routings via carriers other than BNSF, and the proposal was rejected. Voss V.S., ¶ 16.

Viewed comprehensively, BNSF plainly intended to leverage empty private car holding charges to seek alterations of customer behavior, and went far beyond its putative goal of simply relieving "congestion." It was not warranted in the first instance for BNSF to blame any system "congestion" on a subset of private cars, rather than regarding its own fleet and its own inconsistent rail service as equally if not more culpable. And it was doubly inappropriate for BNSF to use the unwarranted excuse of private car "congestion" as leverage, along with its prodigious market power over private car shippers, to extract concessions from customers that BNSF could not obtain through normal commercial negotiations.

E. The July 2001 Changes Treat Private Cars Unfavorably When  
Compared With Carrier Equipment

Another prejudicial aspect of the July 2001 Changes is the disadvantage at which they place private car operators versus shippers who use BNSF cars.

The disadvantages are basically of three types. First, shippers using BNSF cars can order them for placement on a specific "want" date and incur no demurrage penalties unless they refuse the car on that date. Private car shippers, in contrast, cannot request cars for loading on a specific date and never know when their cars will arrive at the BNSF yard serving their facilities, becoming potentially subject to the BNSF Demurrage or Storage Book as soon as the cars arrive. Second, BNSF cars that are assigned to a specific shipper at a specific location ("C" pool cars, described previously), and that are operated similarly to private cars in that both types of equipment routinely move to a repetitive loading point, are allowed unchargeable days at the loading point until ordered for placement. Private cars receive no such unchargeable days. Third, empty TTX or Railbox cars, under the control of BNSF while on its lines, are held by BNSF for up to five days (or perhaps longer) awaiting placement for loading without any charge to TTX or Railbox (the owners of those cars), or to any shipper. After five days of waiting for a loading request, BNSF can request TTX to reassign the cars.

i. Shippers Order Carrier Cars For Loading On A Specific Date  
But Cannot Order Private Cars

BNSF's governing tariffs provide that, when a private car is unloaded, it automatically is reverse-routed to its prior "loading station" unless BNSF, prior to the time of unloading, receives instructions to route the empty car to a different shipper loading

point, in which event the car is routed to the new loading- point.<sup>21</sup> A shipper has no opportunity to request that its private car be delivered to the loading station on any specific date. The car shows up whenever BNSF decides it should, and generally without predictability, consistency, or reliability, even under BNSF's own schedules. As soon as the private car arrives at the loading station, it is constructively placed if the shipper cannot accept it on private track. Mack V.S., ¶ 21. On the other hand, a shipper can order a rail-owned or controlled car for loading on a specific date, avoiding the commencement of demurrage charges until a date of the shipper's choosing. This distinction provides clearly preferential conditions for shippers using BNSF-controlled cars.

ii. Carrier-Controlled Cars Are Held Empty Without Charge Awaiting Shipper Loading Requests While Private Cars Are Not

Cars operating under BNSF control are placed in various service pools by BNSF. Several such pools are defined in Item E of the UMLER Data Specification Manual, applicable to cars in assigned service. The classifications in Item E are prescribed by the Association of American Railroads ("AAR").<sup>22</sup>

Among the pools into which cars are placed for operations in assigned service on BNSF pursuant to Item E is the category "P", which restricts cars for use in a commodity pool.<sup>23</sup> Some assigned railroad cars are in "C" pools on BNSF, defined as a pool for a "[r]ailroad car assigned to a specific shipper at a specific location." These types of cars receive handling very similar to private cars because, after the "C" pool cars are unloaded, they are moved by BNSF back to the shipper and the location to which the cars

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<sup>21</sup> Langston Dep. Ex. 23; Langston Dep. Tr., Vol. 2, p. 32.

<sup>22</sup> Langston Dep. Ex. 24; Langston Dep. Tr., Vol. 2, p. 37.

<sup>23</sup> Langston Dep. Tr., Vol. 2, p. 39.

are assigned.<sup>24</sup> The assigned "C" pool cars are held for an unlimited number of days by BNSF until they are ordered by a shipper. *Ibid.* No charge is made to the "C" pool assigned shipper for the days when the empty cars are held by BNSF awaiting a car order by the assigned shipper. Only BNSF assigned car customers who have voluntarily entered into an agreement with BNSF to pay a daily charge if they fail to accept the car when it arrives at their loading station are assessed a charge if the car is held empty on BNSF track at the loading station.<sup>25</sup>

Private cars operating on BNSF are given a pool classification of "I".<sup>26</sup> L. E. Peabody, a consulting firm retained by Complainants, examined a large volume of electronic car movement records furnished by BNSF through discovery, all designated as Highly Confidential. L. E. Peabody analyzed movement characteristics for "C" pool cars because they are handled in a virtually identical manner to private cars; that is, they are assigned to a specific shipper at a specific loading point and, when empty, are routed back to that loading point. Car movement data was examined for two periods of time; March 2004 through February 2005 and the years 2001 and 2002.<sup>27</sup>

For the 2004-2005 period, L. E. Peabody's analysis shows that "C" pool cars were held empty at their last station prior to actual or constructive placement for an average of days per cycle. In 2001 through 2002, the cars were held empty at their last station prior to actual or constructive placement for an average of days per cycle. L. E. Pea-

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<sup>24</sup> Langston Dep. Tr., Vol. 2, p. 42-44.

<sup>25</sup> Langston Dep. Ex. 24; Langston Dep. Tr., Vol. 2, pp. 42-43.

<sup>26</sup> Langston Dep. Tr., Vol. 2, p. 39.

<sup>27</sup> Complainants originally requested BNSF to produce car movement records for the years 2000, 2001, 2002, and 2004. BNSF informed Complainants that it kept such records in a live, accessible status for the most recent 13-month period, and that it would require a great deal of effort for BNSF to recreate electronic records for prior periods. Complainants accordingly agreed to alter their request by eliminating the year 2000 and by accepting the most recent 12-month period for which BNSF had electronic records extant.

body V.S., ¶ Table No. 2. During this holding period, the "C" pool cars were entirely free from the application of any demurrage rules or charges and were held by BNSF, at its sole expense, for the benefit of a specific shipper assignee. Private cars, on the other hand, become subject to the BNSF Demurrage and Storage Rules as soon as they arrive at the loading station if the cars are not immediately accepted by the shipper. This gives BNSF cars another advantage over private cars that the BNSF cars did not enjoy prior to the July 2001 Changes.

AAR rules permit a railroad or a shipper to cancel a "C" pool designation, absent other agreements between them, on short notice. However, that privilege provides no basis in fact for any effort to distinguish a "C" pool car from a private car. L. E. Peabody determined from BNSF's records that "C" pool cars returned to their previous loading point for reloading     percent of the time in the March 2004-February 2005 period, and     percent of the time in 2001 through 2002. These data establish that BNSF in fact handles "C" pool cars as repetitively as it handles private cars and rarely exercises its option to remove the "C" pool cars from a specific assignment and make them available to other shipping locations. *Ibid.*

Cars with railroad marks operated by BNSF thereby receive two advantages over private cars: (1) they can be ordered for a specific day, whereas private cars must be accepted whenever they arrive, without advance notice, and subject to highly irregular service, and (2) they are held empty by BNSF without charge at their loading station for an unlimited period of time awaiting a shipper's loading request. This can be as much time as BNSF elects to give, but as a practical matter it averages two to three days per car, awaiting a shipper request for use, while private cars are accorded no such leeway.

iii. BNSF Shippers Using TTX And Railbox Cars Receive The Benefit Of Free Days Of Empty Car Storage Prior To Loading

TTX and Railbox supply boxcars, intermodal cars, flatcars, bulkhead cars, and center beam cars to BNSF and other railroads. BNSF pays a daily rental for the cars and controls them largely as if it were a lessee. Under its agreements with TTX and Railbox, BNSF has to pay rent on the cars for up to five days while holding them for a prospective load; after that, BNSF can declare the cars as surplus cars and make them available for reassignment to another railroad. Just like BNSF's own equipment, TTX and Railbox center beam, bulkhead, and boxcars are not placed for loading until ordered by a shipper, and are held by BNSF without charge to the shipper until that order is placed, which can be indefinitely.<sup>28</sup>

BNSF holds empty TTX and Railbox equipment free of charge while awaiting loading requests because it recognizes that holding these empty cars prior to loading at no charge to a customer is part of BNSF's cost of doing business. *Ibid.* BNSF's treatment of private cars is very different and prejudicial to shippers using private cars. Mack V.S., ¶ 30.

F. BNSF's Empty Private Car Holding Charges Are More Rigid And Cause More Problems For Complainants Than The Policies Of Any Other Class I Railroad

Several Class I railroads in addition to BNSF have tariffs that contain some form of charge if empty private cars are held on railroad track prior to loading under varying circumstances. Complainants proceeded against the BNSF provisions because they were the first and most pervasive such rules in the rail industry.

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<sup>28</sup> Langston Dep. Tr., Vol. 1, pp. 186-195.

The empty car provisions of Union Pacific Railroad Company ("UP") in many respects most closely resemble those of BNSF, but the UP charges do not apply to any type of car carrying grain or grain products (including tank cars) and therefore have not affected the complaining shippers. Mack V.S., ¶ 31.

Canadian National Railroad ("CN") approaches empty private car holding activities as a function of the shipper's loading needs and does not apply traditional demurrage or limited free days. CN attempts to reach a mutual agreement with its customers regarding empty private car holding needs, and enters into storage agreements, but does not assess charges unless there is such a storage agreement and it has been violated. CN takes a flexible outlook toward private car storage. Mack V.S., ¶ 30; Hiser V.S., ¶ 3.

CSX Transportation ("CSX") had an empty private car storage tariff in 2001 that applied to only a limited number of points on its system, not including any points at which NAFCA shipper members have loading facilities. Effective January 1, 2005, CSX published a broader empty private car holding charge tariff, but allowed 20 days' free time before its charges became effective. Mack V.S., ¶ 33.

Norfolk Southern Railway Company ("NS") has no empty private car holding charges. Mack V.S., ¶ 32.

All of the shipper Complainants are served by one or more Class I railroads other than BNSF. None of the shipper Complainants have incurred any empty car holding charges from any Class I railroad other than BNSF. Mack V.S., ¶¶30-33 ; Voss V.S., ¶ 3; Sims V.S., ¶ 20; Wallace V.S., ¶ 17; Hiser V.S., ¶ 3; Gustafson V.S., ¶ 3; Neumayer V.S., ¶ 24.



#### **IV. ARGUMENT**

##### **A. BNSF Used Its Demurrage And Storage Tariffs In Ways That Constituted Unreasonable Practices**

Section 10702 of the Act requires a "rail carrier providing transportation or service subject to the jurisdiction of the Board under this part [to] establish reasonable ... rules and practices on matters related to that transportation or service." Tariff rules pertaining to the use of carrier track to hold empty freight cars of either railroad or private ownership prior to loading fall within the Board's jurisdiction under Section 10702. The term "transportation" as used in Section 10702 is defined in 49 U.S.C. § 10102(9) to include any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of ... property ... by rail ... and ... services related to that movement." BNSF tariff rules related to the use of its track to hold empty private cars awaiting loading for shipment via BNSF or other railroads plainly come within the reach of Section 10702.

The term "unreasonable practice" is not defined in the statute but is broad enough to encompass virtually any manner of carrier action found by the Board to be unreasonable in context. The Board has rejected carrier assertions that the term "practices" is limited to rates, tariffs, and tangible aspects of rail operations. It has held that matters such as car allocation policies and carrier misrepresentations can be found unlawful under Section 10702. Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company, d/b/a CP Rail System, STB Docket No. 41687 (December 8, 1999), 1999 WL 1117130 (S.T.B.). In Grain Land Coop, the Board stated:

The gist of the complaint is that CP violated the law in the way in which it carried out its car service obligations. Clearly, we have jurisdiction over those sorts of claims,

whether they are couched in terms of common carrier obligation or car service ... unreasonable practices in connection with car availability ... or unlawful discrimination....

Decision at 3.

The ICC and Board have also, in a number of decisions, found railroad demurrage charges and/or collection practices in violation of the Act's prohibition against unreasonable practices. See, e.g., Ormet Corp. v. Illinois Central R. Co., 341 I.C.C. 647 (1972). BNSF's attempt to rely on demurrage concepts to support its empty private car storage charges makes ICC precedent on demurrage relevant to this proceeding.

More fundamentally, the Board should consider the guidance provided by Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981). The court of appeals there affirmed the ICC's conclusion that it is an unreasonable practice for railroads to insist on unnecessary and costly measures at shipper expense.

Though that case involved railroad efforts to insist on special train service for shipments of spent nuclear fuel and this one involves empty private car storage charges claimed to be necessary to address "congestion," there is a basic standard of reasonableness that should apply generally. As the court of appeals said (after acknowledging that safety is a legitimate concern):

Obviously this does not mean that every cost allegedly incurred for a safety reason need be approved by the Commission. The mere assertion of safety as a justification for any particular expenditure by a railroad company is not conclusive upon the Commission's judgment of the reasonableness of the expenditure or the tariff based upon it. The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefits.

646 F.2d at 648.

Congestion on rail systems may be a legitimate concern, though no other railroad has adopted as draconian a program for penalizing private cars as BNSF has. However, it does not follow that BNSF is free to impose unprecedented empty private car storage charges that treat such cars as solely responsible for congestion, that generate costs for shippers (and revenues for BNSF) disproportionate to the scope of the alleged problem, and that ignore alternative approaches less disruptive to BNSF's customers.

The Board's jurisdiction over unreasonable practices is sufficiently broad to encompass any unreasonable aspects of BNSF's July 2001 Changes and the unreasonable purposes for which they have been utilized by BNSF.

1. BNSF Should Not Be Permitted To Take Undue Advantage Of The Substantial Market Power It Has Over Those Shippers Who Furnish Private Cars

Even if shippers can sometimes benefit from operating private cars, such benefits are not the sole reason for the existence of so many private cars in rail service today. When BNSF furnishes absolutely no tank cars to its customers but publishes rates applicable in tank cars, refuses to allow its covered hopper cars to be used for certain types of transportation, and is chronically short of other types of covered hopper cars for which rates are published, it cannot be said that shippers have acted voluntarily in closing the gap by providing private cars.

In years long past, when railroads supplied the overwhelming majority of freight cars, the claim that shippers supplying their own cars enjoyed an advantageous position might have had some merit. Such claims have their roots in decisions rendered as 1918. See Shippers Committee v. Ann Arbor Railroad Co., 5 I.C.C. 2d 856, 858 (1989), *af-*

*firmed*, Shippers Committee OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992), observing that [l]arge shippers have always bought private freight cars to protect themselves from recurring shortages," citing cases decided in 1974 and 1918, when private cars were but a small fraction of the overall car fleet. As noted above, those conditions no longer prevail, at least with respect to tank cars and covered hopper cars, the two types of equipment predominantly impacted by the July 2001 Changes.

Today, shippers supply the majority of cars because Class I railroads have reduced their ownership of the national fleet to a distinct minority position and deliberately rely on shippers to furnish cars so that the carriers can avoid the extremely significant costs of doing so. Because of those high costs, shippers would not voluntarily choose to invest their own capital in freight cars were they not heavily reliant on rail service and were railroad inventories of all types of freight cars adequate.

BNSF does not even claim to maintain a car fleet adequate to meet anything but "average demand," even where it elects to operate certain types of cars. However, because of private cars, BNSF enjoys not just "average" revenues from the commodities transported in those cars, but derives approximately      percent of its total of \$10.95 billion in annual revenue from just the types of private cars to which the July 2001 Changes apply, largely tank cars and covered hopper cars.<sup>29</sup> BNSF enjoys the revenues produced by these private cars with less risk than its customers experience from supplying the cars. *Borts V.S.*, ¶ 21.

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<sup>29</sup> Langston Dep. Tr., Vol. 1, pp. 70-72. BNSF additionally derives approximately      percent of its revenues from private coal cars, to which the July 2001 Changes are inapplicable, and about      to      percent more from TTX cars, which, although privately marked, are owned indirectly by the railroad industry and, like coal cars, also are immune from the July 2001 Changes. *Ibid.*

Regardless of why BNSF maintains only a partial car fleet and regardless of why shippers acquire private cars, the fact remains that shippers who have taken that step become even more subject to BNSF market power than those rail shippers who can simply choose whether or not to avail themselves of BNSF service. Once shippers make the very substantial investment that private cars require, they cannot simply walk away from rail service, as BNSF no doubt realizes. That reality was recognized by Judge (now Justice) Scalia, when he observed that assigned-car shippers (shippers utilizing carrier cars earmarked for their exclusive use) are "more likely to represent a captive market." Dana Corporation v. ICC, 703 F. 2d 1297, 1304 (D.C. Cir. 1983). Private car shippers, who own or have long-term leases for their cars, are even more likely to represent a captive market. See Borts V.S., ¶ 4.

Protecting highly captive customers from abusive practices promotes the Rail Transportation Policy. See 49 U.S.C. § 10101, where the Board is encouraged to step in "where there is an absence of effective competition" (Subsection (6)) and "to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination" (Subsection (12)).

Intervention by the Board is particularly appropriate in this matter because of BNSF's extremist views and callous attitude toward the consequences of its actions.

BNSF predicated the July 2001 Changes on a claim that private cars were responsible for seemingly all "congestion" on the BNSF system. In a verified statement filed with the Board in 2003 in defense of the July 2001 Changes, the first and foremost reason advanced by BNSF for the July 2001 Changes was to correct conditions under which private cars were stored on BNSF tracks for 30 days or more, causing "congestion." Yet, on

the very day in April 2001 selected by BNSF to illustrate its claim, the number of empty BNSF cars exceeded the number of empty private cars on BNSF's system by a factor of , and BNSF ultimately acknowledged that it cannot attribute "congestion" to private cars any more than to idle carrier cars. A basic predicate for the July 2001 Changes simply was invalid, and BNSF had reason to know so.

BNSF obviously was aware that its service was erratic and unpredictable. Its own website displayed widely varying estimated transit times between pairs of points, depending on the day of the week the shipment originated, and it cautioned its customers not to rely on even those estimates. It is obvious that such erratic service requires more, not fewer, cars. Yet, BNSF's answer was not to acknowledge its own role in creating any of the problems it allegedly sought to cure through the July 2001 Changes, but to blame its customers for not compensating for poor rail service.

BNSF offered the outlandish suggestion that shippers should plan to originate traffic only on days when BNSF's transit times were scheduled to be the shortest, in essence proposing that shippers utilize their facilities only part-time. Rather than recognizing that its customers have been forced to respond to unpredictable or poor service by acquiring additional private cars, BNSF also suggested that its customers might cut back production or close their facilities if not satisfied with BNSF service.

These uses of the July 2001 Changes are in themselves unlawful practices. In addition to being outlandish, BNSF's suggestion that shippers should adjust their output to BNSF's convenience is unlawful. Dana Corporation v. IC.C., *supra*, 703 F.2d at 1302 ("the proposition that shippers must accommodate themselves to the carriers' convenience ... makes a nullity of the statutory requirement that rail carriers 'furnish ... adequate car

service'."). BNSF's extremist position is also symptomatic of a carrier totally confident that it has absolute market power over those of its customers targeted by the July 2001 Changes. The Board must act to mitigate the resulting unreasonable practices.

2. BNSF Improperly Places The Blame For "Congestion" On Private Cars

BNSF identified private cars as the cause of "congestion" on its system because of the number of such cars sitting on BNSF track at the same location for more than 30 days on April 30, 2001. In advancing that claim to the Board previously, BNSF neglected to mention not only the large volume of BNSF-controlled cars that had been stored for 30 days or more as of the very same date, but that its tracks have continued to hold thousands of stored, serviceable cars daily.<sup>30</sup> Ultimately, BNSF acknowledged that, when both private and railroad cars are held on BNSF track, it is not possible to tell which of them may be causing "congestion."

If there was "congestion" on BNSF's lines caused by private fleets that had been sized to levels sufficient to keep shipper facilities running, rather than to lesser levels preferred by BNSF, BNSF is not without responsibility. It becomes necessary for a shipper to acquire additional private cars when BNSF service flags or is unpredictable. More cars require more holding track. Private freight cars are not trinkets on a shipper's bracelet. They are extremely expensive, whether purchased or leased. If shippers can reduce their fleets, they do so, as occurred when BNSF took steps to make fewer private covered hopper cars necessary for grain transportation. There are now more private cars than 25

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<sup>30</sup> The basis for these data is Langston Dep. Ex. 21, which is included in Volume II of this filing. In reviewing that exhibit, it will be noted that stored private cars declined precipitously in late 2001 and afterward, but that decline should not be seen as a sign that the July 2001 Changes dramatically removed empty private cars from the BNSF system. As shipper leases of BNSF yard track were brought about, private cars remained in the same BNSF yards they had always occupied, but private cars occupying leased track no longer were regarded as stored on BNSF track.

years ago because there are fewer railroad cars, but no single private car causes more "congestion" than any single car supplied by BNSF.

If BNSF were the sole supplier of freight cars for loading on its system, and provided poor service that required additional cars to handle customer business, BNSF would be responsible for either improving its service to consistently reliable levels so that fewer cars would be necessary over time, or adding additional track capacity at its expense to hold the cars throughout their transit cycles. Shippers should not be forced to curtail the use of processing or manufacturing facilities that were constructed at great expense in reliance on rail service, or to construct additional trackage, merely because BNSF exercises its market power to compel them to do so.<sup>31</sup>

It is an unreasonable use by BNSF of its common carrier power to publish a tariff to penalize private car shippers because they have not alleviated "congestion" for which they are not even entirely or primarily responsible.

3. It Is An Unreasonable Practice To Use A Common Carrier Tariff As A Tool To Coerce Selected Shippers To Pay For Rail Infrastructure Improvements That Benefit All BNSF Customers

The July 2001 Changes were part of a BNSF campaign to enlarge track infrastructure for the benefit of BNSF without BNSF capital outlays. That conclusion is inescapable, based on BNSF's own announcement of the July 2001 Changes. From the outset, BNSF intended that the July 2001 Changes would provide a "lever" to "incent corrective behavior" by shippers, including construction or acquisition through lease of additional proprietary track.

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<sup>31</sup> The Board should take official notice of the fact that the fastest growing segment of BNSF's business is intermodal traffic, which does not depend on the heavy investment in manufacturing capacity that characterizes the businesses at which the July 2001 Changes were aimed.



Historically, BNSF supplied empty car holding without compensation beyond its freight rates. Empty cars awaiting loading of both railroad and private ownership occupied such track, which was paid for by the revenues generated by both types of cars.

If BNSF adds capacity to improve service or handle increased business volumes, such as intermodal traffic, it often argues that the new capacity inures to the benefit of all of its customers. If industrial track is built to give the BNSF system additional capacity through the relocation of empty private cars, BNSF and all of its customers likewise are the beneficiaries. It is inappropriate for BNSF to make private car suppliers the sole financial source of infrastructure expansion designed specifically to hold freight cars.

Borts V.S., ¶ 11.

BNSF has asserted<sup>32</sup> that the imposition of empty private car holding charges, resulting in forced infrastructure purchases by private car shippers is an appropriate "unbundling" of a private car expense from other rail services and places the full costs of operating private cars on private car shippers rather than shippers who rely on BNSF equipment.

The July 2001 Changes, however, do not truly represent "unbundling". Unbundling is designed to provide a buyer with an option that offers a lower price for the product when it features fewer accessories and components. Borts V.S., ¶ 1. The July 2001 Changes offer no such options. Private car shippers cannot choose a "complete package" which includes the use of a railroad car and BNSF track on which to hold empties because BNSF does not furnish any tank cars or sufficient numbers of other types of cars. Nor have the private car shippers been offered a lower price for obtaining empty car holding track from any source other than BNSF. Freight rates have not been reduced to

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<sup>32</sup> Langston V.S., p. 10.

compensate private car shippers for their loss of full access to BNSF holding track, nor have private car shippers been paid the full costs of constructing their own track. Forcing private car shippers to supply cars and, now, track on which to hold the cars when empty is not "unbundling." It is an exercise of monopoly power by BNSF. Borts V.S., ¶ 3.

The July 2001 Changes now require the private shipper to pay additional costs for private car holding tracks, while continuing to pay the same freight rate as before, and thus continuing to make a contribution toward BNSF track now dedicated largely or exclusively to holding empty cars for shippers using railroad equipment. This creates an economic advantage for those shippers who use rail-owned cars, as against shippers who use private cars. Borts V.S., ¶ 7. Forcing these results on private car shippers represents an application of monopolistic power by BNSF that reduces the economic welfare of the private car shipper. Borts V.S., ¶ 2.

4. BNSF Pursued An Unreasonable Solution To Solve A "Problem" That Was Not Of Complainants' Making

To the extent private car fleets were larger than BNSF would have desired, BNSF has its own service problems to blame. Moreover, even if BNSF was experiencing "congestion," caused by too many cars on line, BNSF could have pursued options other than the July 2001 Changes. For one thing, between 2001 and 2004, BNSF need not have retired nearly 500 miles of yard and switching track of the type utilized to hold empty cars prior to loading. For another, it could have sought to negotiate the construction of additional industrial trackage by fully compensating those customers willing and able to construct such trackage on their property. Instead, BNSF reduced its track inventory, refused to seek free and voluntary agreements from its customers when it should have, and instead published the July 2001 Changes to "incent corrective behavior."

5. It Is An Unreasonable Practice To Use A Demurrage Tariff As A Means Of Exacting Track Rentals At Inflated Prices

Use by BNSF of its demurrage and storage tariffs to bring about increased track rentals at inflated prices also is an unreasonable practice.

BNSF's program of renting yard track for empty private cars was tied to and a direct result of the July 2001 Changes. BNSF offered track leases as a way for those of its customers unable or unwilling to build additional industrial track to avoid payment of the new empty car holding charges. As a result of those steps, BNSF greatly increased the amount of yard trackage under lease to shippers as well as the rental costs for that track. The new rental levels, at \$10.00, \$20.00, or \$30.00 per foot, yield annual rates of return to BNSF of up to 70 percent.

Increased use by shippers of BNSF yard track under lease does absolutely nothing to alleviate the "congestion" which the July 2001 Changes ostensibly were designed to cure. The leases are for "floating" track space, meaning that BNSF is free to place the shipper's cars up to the limit allowed by the amount of track leased anywhere that BNSF selects, just as BNSF did before it imposed empty car holding charges. Actually, BNSF could collect rentals from more than one shipper for use of what amounts to the same track. BNSF has found a way to claim that "congestion" requires correction through demurrage or storage charges, and then to profit from that claim by taking steps that do nothing to alleviate the "congestion" but instead merely increase BNSF's revenue.

These devious uses of tariffs are not only unreasonable on their face, but inconsistent with statutory requirements for demurrage. 49 U.S.C. § 10746 provides:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to –

- (1) freight car use and distribution; and
- (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

There is no statutory definition of the term "storage" and no statutory provision prescribing the method of computing storage charges or the rules related to such charges. Storage charges were not designed to apply to cars held for loading. Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C. 2d 924, 933 (1985) ("Storage charges differ from demurrage in that the detained car is held for purposes other than loading or unloading, usually on the railroad's rather than shipper's premises.") BNSF nevertheless elected to implement its July 2001 Changes as both demurrage and storage provisions "[f]or its own convenience and the [alleged] convenience of its shippers."

BNSF does not believe that legal standards applicable to those of the July 2001 Changes appearing in its Storage Book as storage rules and charges differ from the legal standards that apply to those of the July 2001 Changes that appear in its Demurrage Book as demurrage rules and charges. Complainants' Interrogatory No. 1 to BNSF requested BNSF to "explain fully why BNSF elected to publish certain of the July 2001 Changes in its Storage Book 6005 and certain of such changes in its Demurrage Book 6004" and also to state whether "BNSF believes that legal standards ... differ" as between the Demurrage Book and Storage Book. BNSF's response was as follows:

Subject to and without waiving any and all applicable objections incorporated herein, BNSF replies as follows: BNSF's Demurrage Book 6004-A includes demurrage tariffs applicable to BNSF's agricultural business. For its own convenience and the convenience of its shippers, BNSF classified the July 1 Changes applicable to covered hopper cars transporting grain as "demurrage" and published them in Demurrage Book 6004-A in order to centrally maintain all demurrage tariffs related to its agricultural business. Agricultural shippers can and do use both railroad-controlled and private covered hopper cars to carry grain, and BNSF believed it would have been confusing in this instance for two different tariffs to have been used. BNSF classified the July 1 Changes applicable to its non-agricultural business (i.e., applicable to other than covered hopper cars transporting grain) as "storage" and published them in Private Car Storage Book 6005. BNSF does not believe that legal standards or other considerations (beyond what is stated herein) applicable to the July 1 Changes that appear in Storage Book 6005 differ from those that apply to the July 1 Changes that appear in Demurrage Book 6004-A.

The July 2001 Changes, whether published as demurrage provisions or storage provisions, do not fulfill the objectives of Section 10746 when used to foster substantial new leases of BNSF yard track at elevated rented levels. In order to fulfill the purposes of Section 10706, demurrage charges "embrace two distinct elements, namely, compensation for the use of the car and a penalty to insure prompt return of the equipment to public service." Ormet Corp., supra. Inasmuch as BNSF owns none of the cars to which any charges applicable under the July 2001 Changes would apply, those Changes cannot fulfill the goal of providing compensation to BNSF for the use of its cars or meet the related statutory purpose of maintenance of an adequate supply of freight cars. To the contrary, because one of BNSF's purposes was to reduce the number of private cars on its system (including tank cars, which BNSF does not supply at all), the July 1 Changes are intended to accomplish goals that are contrary to the statutory purposes.

Nor do the demurrage and storage provisions published as part of the July 2001 Changes "insure prompt return of the equipment to public service" or act in a "way that fulfills the national needs related to ... freight car use and distribution." BNSF asserted that the July 2001 Changes, in addition to bringing about a reduction in the ability of shippers to maintain fleets sufficient to meet their commercial needs (despite erratic and unpredictable BNSF service), also were intended to promote additional leases of BNSF yard track. Cumulatively, hundreds of miles of BNSF yard track were leased to shippers following implementation of the July 2001 Changes, but those leases could not conceivably have improved freight car use and distribution because private cars held on leased BNSF track remained in the same BNSF yards as prior to the July 2001 Changes.

Using the metrics recognized by the railroad industry and the Board as measurements of railroad performance, the July 2001 Changes cannot be said to have been successful in bringing about improved freight car use and rail service on BNSF. Between 2001 and 2004, BNSF on-time performance dropped from 89 percent to 82 percent; terminal dwell time increased; and train speed improved by less than one mile per hour. Even if the July 2001 Changes may have prompted shippers to order empty private cars in for loading more quickly than previously, as BNSF claims, nothing has been produced to demonstrate that *those* changes in shipper practices have resulted in any overall improvement in BNSF service or system fluidity.

As noted above, the July 2001 Changes were used by BNSF in a deliberate series of efforts to lever additional business commitments from its customers. A BNSF sales person, referring to those Changes, stated that "this is forcing [the customer] to build the storage tracks" and providing BNSF with an opportunity to "tie up competitive business

at high margins for long years." BNSF advised groups of customers that they could avoid the impacts of the July 2001 Changes if they would enter into contracts at "premium rates" for so-called assured BNSF service. And BNSF made a proposal to one customer that, if it would reduce its overall private fleet by     percent, BNSF would reduce its guaranteed minimum volumes to that shipper by     percent, a proposal that would have forced the shipper to take business away from other carriers because the reduction in fleet size was not commensurate with the reduction in minimum volume on BNSF.

In short, the July 2001 Changes were not designed to meet, and did not meet, the statutory purposes of Section 10746. The main goal of the July 2001 Changes was to provide BNSF with increased track rental revenues, assured business volumes, and system infrastructure expansion at the expense of a subset of private car shippers, and to otherwise increase BNSF marketing advantages. These are improper and unreasonable uses of demurrage and storage tariffs and are unreasonable practices.

6.     Neither The Demurrage Book Nor The Storage Book Contain Provisions That Allow Relief From Pervasive Inconsistencies In BNSF Service

Inconsistent BNSF service leads not only to the addition of private cars and the need for supplemental holding track, but also to the imposition of demurrage and storage charges. Without any ability to predict, control, or request dates for the arrival of empty private cars, shippers experience the arrival of more cars than are desirable at one time, and fewer cars than are necessary at other times. If the arrival of more cars than are desirable leads to the assessment of demurrage charges, the shipper can find no relief in BNSF's rules; indeed, the rules bar such relief.

BNSF's Demurrage Book provisions contain no relief for any manner of service failure by BNSF. Item 5010 of the Demurrage Book allows bunching relief for loaded cars, but not for empty cars. Only Acts of God or strikes entitle a shipper to relief from empty car demurrage charges.

The Storage Book has a bunching relief provision (Item 3100, Appendix B-2 to Mack V.S.), but relief for bunching is confined to the narrow terms set forth in the tariff, i.e., bunching occurs, according to the tariff, only for cars "originating at the same point on different dates, moving via the same route," or where "cars originating at different points and transported via the same route from a BNSF intermediate common point ... are bunched after interchange or arrival at the BNSF common point." Thus, garden variety inconsistent service producing unpredictable arrival times does not qualify for relief under the Storage Book.

Prior to the adoption of the July 2001 Changes, inconsistent and unpredictable BNSF service did not have all of the adverse financial impacts to shippers that occur under the current provisions because empty cars were held without charge. Now that empty cars are subject to demurrage or storage charges, relief for BNSF's repetitive service problems is necessary to mitigate those impacts.

Demurrage charges calculated under the Demurrage Book are subject to a system of debits and credits, a system sometimes, but perhaps inappropriately, referred to as an "averaging" system. The method of computing charges arising under the Storage Book is known as a "straight" plan because it involves no credits and debits.

Average demurrage plans historically provided fewer grounds upon which demurrage charges could be excused. For example, whereas matters such as floods or hurri-



canes might be grounds for relief under a straight demurrage plan, the availability of offsetting credits under an average agreement was regarded as foreclosing such avenues of demurrage relief.

On numerous occasions, courts upheld the distinctions between the narrower grounds for demurrage relief available under an average plan and the broader grounds available under a straight plan. However, in doing so the courts stressed the fact that an average agreement was to be a *voluntary* choice for the shipper, in the nature of a contractual agreement:

Demurrage is assessed according to one of two nationwide tariffs. The first provides for "straight demurrage," and if the shipper and railroad do not provide otherwise they are automatically governed by it. Under straight demurrage, for every day the shipper holds back a car beyond the period (usually two days) that he is allowed to keep it for loading he must pay the railroad \$10, but after four days this rises to \$20 and after six days to \$30, the amount over \$10 per day being referred to as a penalty. The shipper gets no credit for returning cars early but on the other hand is not assessed demurrage if severe weather or other circumstances beyond his control prevent him from returning the cars on time. The other type of demurrage is the "average" agreement, under which the shipper gets a \$10 credit against demurrage for every car that he returns within 24 hours of receipt but loses the excuses allowed under straight demurrage except for delay caused by floods, earthquakes, tornadoes, or hurricanes. A railroad cannot force a shipper into the average agreement.... Not only must the shipper agree to join the average agreement but he can on short notice unilaterally return to straight demurrage.

Field Container Corporation v. Interstate Commerce Commission, 712 F.2d 250, 255 (7th Cir. 1983).

BNSF's tariffs contain no provisions for a shipper to choose between the two types of "demurrage" plans imposed – the "average" approach in the Demurrage Book

and the straight plan in the Storage Book. Instead, BNSF's demurrage provisions totally and arbitrarily deprive shippers of defenses – even the limited bunching defense available under the Storage Book – without providing the shipper with a choice of plan.

It is a tenet of demurrage law that a shipper may not be charged demurrage where the demurrage was not of the shipper's making and due diligence was exercised by the shipper. *See Ormet*, and cases cited therein. If demurrage charges accrue solely on account of railroad performance, and the shipper has exercised due diligence, demurrage charges should be cancelled in their entirety. *Ormet*, 341 I.C.C. at 651.

In *Dana Corporation v. ICC*, *supra*, the court observed that a "charge for equipment use prevented by the carrier's own fault is an unreasonable rate in violation of 49 U.S.C. § 10701." 703 F.2d at 1305. In that case, the court noted that demurrage charges are not merely a penalty against a shipper for undue detention of equipment, but that remission, or cancellation, of demurrage charges also acts as a penalty against the railroad for poor performance: "the idle cars, delivered too late for earlier loading as a result of the carriers' fault, were in fact not serving the shippers' convenience – just as in the ordinary demurrage situation a car waiting for loading because of yard congestion is not doing so." *Ibid*. The court thus refused to allow a carrier to earn demurrage based on its own fault and remanded the case to the ICC to "permit the shippers to show that, in particular instances, the idle-car time for which charges are assessed is attributable to the fault of the carriers." *Ibid*.

Neither BNSF's Demurrage Book nor its Storage Book make provision for a shipper to raise BNSF service malfunctions as a basis for demurrage waiver. To that extent, and to the extent that BNSF has arbitrarily deprived shippers who operate agricultural

covered hopper cars subject to the Demurrage Book of even the limited defenses available under the Storage Book, the two tariffs are unreasonable.

B.     The July 2001 Changes Of BNSF Constitute Unreasonable Rules  
          And Practices On Car Service

Pursuant to 49 U.S.C. § 11121(a)(1), BNSF "shall ... establish, observe, and enforce reasonable rules and practices on car service." The definition of car service "includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of ... cars ... used in the transportation of property by a rail carrier." 49 U.S.C. § 10102(2). Demurrage provisions have been held to be a form of car service. *See Illinois Central Railroad v. South Tec Development Warehouse, et al.*, 1999 WL 519042 (N.D. Ill.) ("the terms car supply" and "car service" are defined in the Interstate Commerce Act as encompassing demurrage charges").

The Board should conclude that BNSF's empty private car holding charges and rules are unlawful as unreasonable practices in the circumstances presented and set them aside entirely. Failing that, the Board should find that the July 2001 Changes are not reasonable rules and practices on car service.

It is plain that the demurrage provisions and storage provisions differ sharply, even though they apply to cars occupying the same BNSF track and in many cases operated by the same shipper at the same origin facility. Covered hopper cars handling agricultural commodities start to incur chargeable days more quickly than other cars and incur rates up to five times the daily charge incurred by cars subject to the Storage Book. There is no legal justification for treating agricultural cars more harshly than other types of private cars.

As noted on more than one occasion above (because it was stressed by BNSF itself throughout the Langston V.S. and R.V.S.), BNSF's avowed primary purpose in adopting the July 2001 Changes was to reduce "congestion" on its lines. In administering those of its Changes implemented through the Storage Book, BNSF adopted the position that its charges should reflect the need to cope with "congestion" of differing proportions throughout its system. It examined its system thoroughly to determine areas where "congestion" was deemed to be "most likely" "likely," and "least likely." Where "congestion" was deemed to be "most likely," BNSF retained its initial \$25.00 per car per day charge. Where "congestion" was deemed to be only "likely," it instituted a \$15.00 per day per car charge. And where "congestion" was deemed to be "least likely," the charge was reduced to \$10.00. BNSF testified that it was "pretty comfortable ... that these ... differentiations do reflect reliable differences in congestion on the railroad."

No one car can cause more "congestion" than another, as BNSF's Mr. Langston recognized when he testified that, where "congestion" is concerned, "a car's a car's a car." Thus, if a tank car is deemed to require only a \$10.00 per day charge in, say, Iowa to relieve a "least likely" level of "congestion," there is no reason for an agricultural covered hopper car to require a \$50.00 per day charge to relieve "congestion" at the same time and place.

The imposition of different empty car holding rules and rates for empty cars occupying the same track at the same time for the same shipper should be regarded as a failure to establish, observe, and enforce reasonable rules and practices on car service, as required by Section 11121(a)(1). Because BNSF is satisfied that its Storage Book provisions are "reliable" to meet the anti-"congestion" goals of the July 2001 Changes, they are

to be preferred over the Demurrage Book provisions if the July 1 Changes are permitted to survive despite the Section 10702 prohibitions against unreasonable practices.

BNSF's rationale for placing agricultural covered hopper cars under the Demurrage Book for the purpose of assessing empty private car holding charges is that its shippers load both private and carrier-furnished covered hopper cars, and should not face different rules and charges for each type of car. However, BNSF's pre-July 2001 demurrage provisions had no application to empty private cars. They applied to carrier equipment and then only if it was ordered for a "want" date but not accepted by the shipper. There is a significant difference between carrier and private cars for demurrage purposes: carriers are entitled to recover their costs of car ownership for their own cars through demurrage provisions, but they have no car ownership costs for idle private cars.<sup>33</sup> There is ample basis for distinguishing between empty private cars and the loaded private cars for which BNSF originally developed its Demurrage Book rules and charges and there is no valid reason to burden private cars with all of the same demurrage provisions applicable to railroad cars.

The "free time" provisions of the two sets of rules unreasonably favor shippers using railroad cars. Pursuant to AAR rules, BNSF can and does elect to make assignments of specific cars to specific shippers for loading at specific origins. These are the "C" pool cars mentioned previously. They are operated very much like private cars. Once they are unloaded, they are returned empty to their designated loading point for use by the assigned shipper. Although BNSF claims that a "C" pool car differs from a private car because the "C" pool assignment can be terminated by BNSF, whereas BNSF cannot

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<sup>33</sup> Even where BNSF pays mileage allowances on private cars, those allowances are payable only when the car is moving under load. Mack, V.S., ¶ 18. An empty private car cannot produce mileage allowance payments and, accordingly, cannot produce car ownership expenses to BNSF.

similarly terminate a shipper's use of a private car, in practice the distinction is more theoretical than real. Approximately     percent of the time, a "C" pool car on BNSF remains assigned to a specific shipper at a specific origin on a repetitive basis.

There is, however, one significant distinction between a "C" pool car and a private car. BNSF can hold an empty "C" pool car indefinitely waiting for the shipper to order in the car for loading on a specific "want" date. While the "C" pool car is being held awaiting a loading request, the demurrage clock has not begun to run. On the other hand, as soon as an empty private car reaches its designated origin station, the demurrage clock begins if the car is not immediately accepted on industry track.

Utilizing data supplied under seal by BNSF for the period March 2004 through February 2005 and for the full years of 2001 and 2002, L.E. Peabody analyzed the BNSF data and found that "C" pool cars operating on BNSF during these periods were held empty at their last station prior to actual or constructive placement for an average of     days per cycle in 2004-2005 and     days per cycle in 2001 and 2002. The assigned shipper receives the benefit of these free holding days without any charge.

To compare the advantage received by "C" pool car shippers over private car shippers, the relevant period to examine are the days when the empty car is held at the loading station prior to placement. Once a "C" pool car leaves that status and is placed for loading, it may never in fact incur demurrage if it is loaded and released within the tariff's "free time." Indeed, since "C" pool shippers are permitted to order empty cars for loading on a specific day, whereas private car shippers have no such privilege, it is reasonable to anticipate that "C" pool shippers will order cars for loading on days when they

expect to be able to complete that loading within the applicable free time and incur few if any post-placement demurrage days.

Holding an empty "C" pool car on BNSF track for several days to allow a "C" pool shipper an opportunity to request that car for loading on a day when the shipper believes the car can be utilized within free time provides a distinct advantage to the "C" pool car shipper. A private car shipper receives no such forbearance. In the name of removing "congestion," the July 2001 Changes demand that such a shipper accept its car immediately upon arrival at the origin station to remove the car from BNSF trackage, and the shipper is penalized if it fails to do so. The "C" pool car meanwhile occupies just as much BNSF track space and, if there is "congestion," contributes to that state just as much as the private car. The private car clearly is receiving prejudicial treatment compared with the carrier car, at a higher potential cost to the private car user.

BNSF customers utilizing TTX and Railbox equipment also receive an advantage over private car shippers as a result of the July 2001 Changes. BNSF, although paying daily rental to TTX or Railbox, controls their cars while on its lines. Empties are held by BNSF until requested for loading by a customer. BNSF can hold those cars indefinitely but may or may not do so. Absent a shipper wanting to use the equipment, it can be made available for reassignment by TTX after five days, although TTX is not obligated to remove the car at that point. Even though the incidence of TTX or Railbox cars being idle and empty awaiting a loading request may be lower when, as now, business volumes are high, it remains that BNSF customers receiving TTX and Railbox cars will realize the benefits flowing from free BNSF storage of the cars for a period of days that varies with business conditions. When it comes to private cars, however, BNSF policies fail to rec-

ognize changes in business levels. The July 2001 Changes impose empty car holding charges without variation in free time days and regardless of a shipper's business level.

If the July 2001 Changes are to be sustained in any respect, they should be adjusted to provide equal treatment for empty carrier and private cars at origin points. Because BNSF can be expected, over time, to reduce or terminate car assignments to shippers who chronically fail to make reasonably consistent use of assigned cars, it is not realistic to expect empty "C" pool cars to be held by BNSF for indefinite periods awaiting orders to load (although it is realistic to expect that BNSF will be more tolerant toward delayed use of such cars when business demands slacken). BNSF's car movement records analyzed by L.E. Peabody show that BNSF generally keeps empty "C" pool cars for     to     days to await placement orders from assigned shippers and that demurrage exposure does not begin until such orders are given.

The July 2001 Changes were aimed at use of BNSF tracks, not its cars, and the reasonableness of those Changes should be judged by what occurs on BNSF track. Moreover, a private car is placed, actually or constructively, without notice. Its arrival is unpredictable, and shippers find it difficult to accommodate their plant operations and production schedules to inconsistent BNSF service, a factor directly producing chargeable days for private cars. Shippers using BNSF cars are relieved from the burdensome consequences of erratic BNSF service because they can order cars to load on a specific date. BNSF's storage of those cars without charge until such an order is received is what creates the disparity in treatment.

BNSF shippers utilizing TTX or Railbox cars likewise are not compelled to take those cars for loading but are entitled to specify a "want date" for any necessary equip-



ment. BNSF holds the empty TTX and Railbox cars on hand awaiting such orders, at no charge to the shipper. TTX and Railbox cars, moreover, must be held empty by BNSF for five days (if not earlier placed for loading) before BNSF can request reassignment of the cars to another railroad. Whether BNSF will be called upon to hold these cars as empty for the full five days depends on business conditions. Shippers using private cars, however, are allowed no more "free time" on BNSF when business conditions are slow than at any other time.

Private cars and BNSF-controlled cars awaiting loading should be treated equally. Private car shippers should be accorded the same right to order in private cars for specific want dates without payment of demurrage or storage fees until those cars are ordered and not accepted. Failing that, free time for private cars should be increased to a reasonable approximation of the empty car days accumulated by BNSF-controlled cars at origin points before those cars are subjected to demurrage provisions following a placement request by the shipper. Considering both the demonstrated empty holding time on BNSF before "C" pool cars are ordered for loading, and BNSF's obligations under its agreements with TTX and Railbox to hold that type of equipment empty for up to five days awaiting a loading order, Complainants believe that the addition of not fewer than three days to the free time in the Storage Book is amply justified.<sup>34</sup>

C. BNSF Must Compensate Shippers When They Furnish  
Transportation Services Or Instrumentalities

The provisions of 49 U.S.C. § 10745 state that a "rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish a

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<sup>34</sup> Complainants previously have indicated their belief that the Storage Book rules and rates are more appropriate than those in the Demurrage Book, assuming, arguendo, that the July 2001 Changes are not set aside entirely as unreasonable practices.

charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or any instrumentality used in the transportation or service."

Although this language may appear precatory, it is not. Railroads "at their option, may, in lieu of furnishing services or instrumentalities within their obligation, employ or permit the owner of property transported to provide the service and pay an allowance therefor." If a "shipper legitimately performs a service, it is 'entitled, under the plain terms of [the predecessor provision of Section 10745], to be paid by the carrier a just and reasonable allowance,'" Bud Antle, Inc. v. U.S., 593 F.2d 865, 872 (9th Cir. 1979) citing General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 431 (1940). The required compensation may be a cash allowance or may take some other form.<sup>35</sup>

Tracks on which to hold empty cars prior to loading are instrumentalities of transportation previously furnished by BNSF within its freight rate. Such tracks are an integral part of BNSF's service. Regardless of whether each and every empty car is held on BNSF track each and every time it is needed for loading, or whether empty cars are held on BNSF track awaiting loading orders only as circumstances require, BNSF cannot operate as a railroad without holding some empty cars at least some of the time on BNSF trackage awaiting the loading orders which BNSF's shippers are entitled to place. If shippers furnish that track in lieu of BNSF, they are performing a service for which they are entitled to compensation, no less than when they supply other services.

Shippers that replace carrier switching service with their own switching service are entitled to compensation. *See, e.g., A. E. Staley Mfg. Co., Terminal Allowance*, 245

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<sup>35</sup> *See LO-Shippers Action Committee v. Aberdeen and Rockfish Railway Company, et al.*, 4 I.C.C. 2d 1 (1987) ("[w]here no allowance is published, there are dual rate scales"), *affirmed*, LO-Shippers Action Committee v. ICC, 857 F.2d 802 (D.C. Cir. 1988).

I.C.C. 383 (1941). BNSF currently pays allowances to shippers who perform their own switching in lieu of BNSF and pays allowances to shippers who electronically issue bills of lading and freight billings in lieu of BNSF.<sup>36</sup> Shippers are compensated for furnishing additions to freight cars necessary to make the cars suitable for their proposed transportation use. Furnishing of Grain Doors, Southern Frt. Terr., 355 I.C.C. 930 (1977). Unless BNSF can establish that it can operate with no trackage on which to hold empty cars prior to loading, then such trackage must be deemed to be a facility of transportation which, if furnished by a shipper in lieu of BNSF, entitles the shipper to appropriate compensation.

BNSF has paid only partial compensation to shippers that have constructed additional holding track as a consequence of the July 2001 Changes. Substantial private track construction costs, however, have not been reimbursed, nor have any track rental expenses.

Although BNSF continues to provide limited track space to hold empty private cars prior to loading, the track space that has been acquired by shippers through construction or lease clearly was intended to replace at least some BNSF yard trackage, and has done so. Shippers are entitled to compensation under Section 10745 for supplying facilities that have always been recognized by BNSF as essential and integral to the service and rates offered by BNSF, and remain so.

The Board should order BNSF to make appropriate compensation payments to shippers who have constructed or leased trackage replacing facilities that BNSF no longer offers within its freight rate. The level of compensation to which the shipper is entitled cannot exceed the shipper's own costs in providing and maintaining the facility nor the

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<sup>36</sup> Langston Dep. Tr., Vol. 2, pp. 80-81.

costs to the carrier were it to provide those facilities itself. Allowances for Trucking Baled Cotton, Ark., Okla., Tex., 329 I.C.C. 786, 797-98 (1967).<sup>37</sup>

If the Board agrees that Complainants are entitled to compensation under Section 10745 where they have constructed or leased trackage to replace the holding tracks for empty private cars made unavailable by BNSF as a result of the July 1 Changes, Complainants propose to prepare a statement of damages meeting, as closely as possible, the provisions of 49 C.F.R. Part 1133.

D. Monetary Damages

Several individual Complainants should recover monetary damages for demurrage or storage charges paid to BNSF, in addition to allowances as discussed in the preceding section. Complainants believe, however, particularly in view of the number of issues before the Board, that it would be prudent to await a Board decision on the merits and then deal with the issue of monetary damages, if appropriate, in a supplemental process of the type contemplated at 49 C.F.R. § 1133.2. Although that process in its narrowest sense is molded to apply to "shipments" in dispute, there is no reason why the concept should not apply to other transactions in dispute, such as demurrage or storage charges. Dealing with monetary damages on this basis should not prejudice BNSF in any respect. To the contrary, it should assist BNSF by relieving it of the need to make a detailed response to damage claims at the same time it is preparing its response to broader issues on the merits.

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<sup>37</sup> If the compensation paid pursuant to § 10745 is because the shipper has furnished freight cars, then the level of compensation is governed by the provisions of 49 U.S.C. § 11122. LO-Shippers v. Aberdeen & Rockfish Ry. Co., et al., 4 I.C.C. 2d 1 (1987), *affirmed*, LO-Shippers Action Committee v. ICC, 857 F.2d 802 (D.C. Cir. 1988). Section 11122 is not applicable here.

There is, however, one aspect of damages that may need to be resolved at this point. That is the question raised by BNSF about whether the corporate subsidiaries and affiliates of the Complainants are entitled to recovery. This issue prompted the filing of the Amended Complaint.

Contemporaneously with the filing of the Amended Complaint, Complainants submitted a letter to the Board on March 14, 2005 asserting that the original Complaint had to be construed as permitting claims for monetary damages by named Complainants who are corporate parents on behalf of their subsidiaries and affiliates, based on the factual context of this case and Board precedent. In at least two decisions, International Agricultural Corporation v. Louisville & Nashville Railroad Company, 29 I.C.C. 391 (1914) and Werner v. Director General, 107 I.C.C. 363 (1926), it was held that where the operation of affiliated companies is not separate and distinct from the operation of the parent company, or where the parent company is an agent of a subsidiary or affiliate, a comprehensive damage claim may be maintained by the parent.

So far as Complainants are aware, at this point Cargill is the only named Complainant asserting a claim on behalf of a subsidiary or affiliate for recovery of empty car holding charges. Its subsidiary, Cargill Meat Solutions ("CMS"), received numerous BNSF bills under the Storage Book. BNSF is fully aware from its prior dealings with Cargill and CMS that Cargill frequently acts on behalf of CMS. Cargill not only pays freight bills to BNSF incurred by CMS, but actually paid the contested holding charges arising under the Storage Book. Sims V.S., ¶ 23. Under these circumstances, there should be no question whatsoever regarding the right of Cargill to seek recovery of monetary damages on behalf of CMS. In any event, the Amended Complaint would enti-

tle Cargill to recover on behalf of CMS any damages that accrued for a period preceding the filing of the Amended Complaint by two years, as provided in 49 U.S.C. § 11705(c).

## **V. CONCLUSION**

Claiming that an excess of empty private cars on its lines were causing "congestion," BNSF instituted a regime of new demurrage and storage charges in July 2001 applicable to some, but not all, private cars on the BNSF system. Fully aware that the targeted group of private cars produced a significant amount of its revenue, but nevertheless seeking to avoid infrastructure investments, BNSF designed the July 2001 Changes to cause shippers using the targeted cars to construct additional infrastructure capacity on their property. At the same time, BNSF hoped to use its new charges to obtain business from these shippers on more favorable terms than it had been able to do through normal commercial negotiations.

These were unreasonable practices. There was no proof offered by BNSF to demonstrate "congestion" on its system in the first place; as things turned out, BNSF's operating metrics were better during the year when the new charges were instituted than three years later. And if there had been "congestion," there was no rational basis for blaming it on empty private cars, rather than on BNSF's own empty cars, which were stored on its system in greater profusion than private cars.

Any infrastructure expansion added by private car shippers as a result of the July 2001 Changes inures to the benefit of BNSF and its entire customer base, as it frees up BNSF trackage that had been paid for and used by all shippers. That trackage becomes more readily available for BNSF's own rail cars if empty private cars move elsewhere. Such a benefit to shippers relying on BNSF railcars is an economic windfall to them at

the expense of the targeted private car owners that is made possible only through the exercise of BNSF's monopoly power over private car shippers. If BNSF needs more infrastructure to benefit its entire customer base, BNSF should supply that infrastructure. The Board should not countenance the use of BNSF tariffs to change the balance of economic benefits in favor of some BNSF shippers at the expense of the targeted private car shippers.

If the Board is unwilling to regard BNSF's practices as unlawful in their entirety, it should require that BNSF's tariffs be modified, among other ways, to remove their unreasonable imbalances of terms and disparate treatment of rail cars. There is no legitimate reason for the July 2001 Changes treat agricultural covered hopper cars more harshly than all other types of private cars subject to those Changes. The agricultural covered hoppers incur a demurrage rate that is as much as five times more than the storage rate for the remainder of the targeted private cars. The lower storage rates were carefully designed by BNSF to reflect its studied conclusions regarding levels of "congestion" on its system. If the targeted private cars are to bear any holding charges at all, those in the Storage Book clearly are more appropriate than those in the Demurrage Book.

Retention of the July 2001 Changes also must be conditioned on removal of favoritism given to shippers using rail-supplied cars. Those shippers have the right to order cars for loading on a specific date and incur no exposure for demurrage charges prior to that date. BNSF can hold carrier-controlled cars indefinitely while awaiting such placement orders and as a practical matter holds them for several days on average at no charge to the shipper that ultimately orders them.

Private cars, on the other hand, cannot be ordered for placement on any specific date. They suffer chronically inconsistent and erratic BNSF service, are made available to the shipper at BNSF's whim, and the shipper is expected to either accept them on industry track or become subject to the empty car holding charges as soon as the cars arrive. These inequities can be alleviated if private cars are allowed not fewer than three additional free days over and above those presently available under the Storage Book and are then charged at the Storage Book rates. In addition, BNSF's tariffs should not be allowed to exclude shipper challenges based on erratic BNSF service.

Shippers who have been pressured by the July 2001 Changes into constructing new industrial holding track or into leasing track from BNSF are replacing transportation facilities that BNSF has furnished pursuant to its freight rates and for which the shippers continue to pay through their unreduced freight rates. Shippers in this position are entitled to compensation under Section 10745.

Finally, after considering the issues on the merits, the Board should find that damages are available to those Complainants who have sought damages and who subsequently meet established tests for reparations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew P. Goldstein". The signature is fluid and cursive, with a long horizontal stroke at the end.

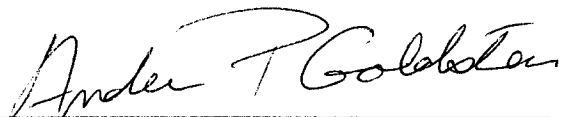
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has, this 29th day of July, 2005, been served on all parties of record, by first class mail, postage prepaid.

  
\_\_\_\_\_  
Andrew P. Goldstein

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**EXHIBIT NO. 1**

**VERIFIED STATEMENT  
OF  
DAN MACK  
ON BEHALF OF  
CHS, INC. and NORTH AMERICA FREIGHT CAR ASSOCIATION**

1. My name is Dan Mack. I am Vice President – Transportation for CHS, Inc. ("CHS"). CHS is a cooperative based in St. Paul, MN, that merchandises and ships grain and grain products throughout the United States. It operates 96 facilities on BNSF Railway ("BNSF"), including those served through reciprocal switching, some of which originate shipments in private cars. I am also President of North America Freight Car Association ("NAFCA"). I submit this Verified Statement on behalf of both CHS and NAFCA.

**I.**

2. NAFCA is an unincorporated association whose members manufacture, are lessors of, or who operate (as lessees or owners) private freight cars. NAFCA was formed to further the interests of private car manufacturers, lessors, owners, and operators. At the time the Complaint in this proceeding was filed, NAFCA had 22 members. It currently has 24 members who collectively own or operate over 500,000 private freight cars, equaling some 73 percent of all private cars, 39 percent of all freight cars in the U.S., and more cars than registered to all U.S. Class I railroads combined.

3. The absolute number of freight cars supplied and the percentage of total freight cars supplied by Class I railroads has been declining steadily, particularly since 1980, requiring shippers to furnish an increasing number and percentage of total freight cars. Table I below shows the dramatic shift in the supply of freight cars that has oc-

curred between 1980 and 2003, according to data compiled by the Association of American Railroads ("AAR"):

Table I

U.S. Freight Car Ownership (000)

Year	Total Cars	Class I RR Cars	Class I RR%	Other RR Cars	Other RR %	Private Cars	Private Car %
1980*	1,711	1,168	68%	102	5%	441	26%
2004**	1,279	467	37%	125	10%	687	53%

Source:       \*     Railroad Facts, 2004, AAR

              \*\*     Railroad Equipment Report, 2004, AAR

4.       Although there are private cars of practically every type, the private fleet<sup>1</sup> is concentrated mainly in tank cars and covered hopper cars. Railroads own less than one percent of all tank cars (and, to my knowledge, they are used to transport railroad company materials such as fuel, rather than revenue freight), making shippers the supplier of virtually 100% of the revenue tank car fleet. In 2004, of 378,000 total covered hopper cars operating in the U.S., Class I railroads owned 30% of the fleet; other railroads owned 7%; and private cars accounted for 64%. No other type of car approaches covered hopper cars and tank cars in percentage of private ownership, other than cars owned by the railroads' subsidiaries, TTX and Railbox.

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<sup>1</sup>       Excluding "private cars," denominated as such by the AAR because of their "X" markings, owned by TTX and Railbox, each of which is, in turn, owned by the railroad industry.

5. There are six commodity groups that rely on covered hopper cars and tank cars for more than 50% of their shipments, as shown in Table II. Private car ownership and use thus is concentrated most heavily in industries that ship those products.

Table II

Commodity Groups Shipping More Than  
50 Percent in Tank and Covered Hopper Cars \*

<u>Farm Products</u>	STCC 01
Covered Hoppers	90%
<u>Food &amp; Kindred Products</u>	STCC 20
Covered Hoppers	37%
Tank Cars	21%
<u>Chemicals &amp; Allied Products</u>	STCC 28
Covered Hoppers	45%
Tank Cars	40%
<u>Stone, Clay &amp; Glass Products</u>	STCC 32
Covered Hoppers	67%
Tank Cars	9%
<u>Petroleum &amp; Coal Products</u>	STCC 29
Tank Cars	63%
Covered Hoppers	6%
<u>Hazardous Waste</u>	STCC 48
Tank Cars	31%
Covered Hoppers	27%

\* Source: Railroad Equipment Report 2004, AAR

6. CHS operates both covered hopper cars and tank cars as a shipper of commodities falling within the STCC definitions of Farm Products and Food & Kindred

Products. I believe, based on both my experience with CHS and as President of NAFCA, that shippers would not acquire and operate tank cars or covered hopper cars (or, I believe, other types of cars) if the railroad industry, including BNSF, did not give the shippers good reason to do so. In the case of tank cars, the reason is obvious; there are no railroad-supplied tank cars.

7. BNSF has suggested in its earlier statements that it does not supply tank cars as matter of shipper preference, a claim that I strongly dispute. BNSF does not require shipper permission to furnish tank cars, any more so than BNSF requires shipper permission to furnish other types of cars. The reason BNSF does not furnish tank cars is purely economic. Tank cars, perhaps more than any other type of rail car, handle commodities that are not fungible. A shipper of, for example, corn sweeteners (liquid sugar substitutes produced from corn that are used in food processing) not only can't permit its corn sweeteners to come in contact with, say, petroleum or even soybean oil, but would not even want a particular configuration of corn sweetener developed for a specific customer to be compromised by contact with a corn sweetener developed to meet corn sweetener specifications of a different customer. Were BNSF and other railroads to furnish tank cars to all customers using such cars for all types of loads, there would have to be a much greater incidence of car cleaning in between loads than there is today, when each shipper can be certain of each private car's prior use and reload the car with an identical commodity if it chooses to do so. Car cleaning by a railroad entails significant expense and delay, because empty cars would have to be routed to cleaning tracks that often are out-of-route between unload and load points, adding both cost and delay to tank car use cycles. Additionally, because many tank car commodities are not fungible, they are

not susceptible to being unloaded from rail cars and placed in bulk storage at destination, similar to the way in which corn, for example, is handled. Purchasers of many commodities moving in tank cars may tend to hold the tank cars on industry track for many days before unloading. Railroads are averse to having their own equipment delayed by destination customers who are unwilling or unable to unload the cars promptly. Railroads such as BNSF appear to have reached the conclusion that it is more economical for shippers to furnish tank cars and other equipment, including specialty covered hopper cars, where product integrity is an issue or where destination unloading practices are an issue.

8. Shippers also furnish the same types of general purpose covered hopper cars as are furnished by railroads, including BNSF. This occurs basically because railroads, such as BNSF, make no secret of the fact that they do not intend to furnish cars sufficient to meet all levels of demand. Railroads candidly encourage shippers to acquire their own general purpose covered hopper cars if the shipper cannot afford to suffer carrier car placement delays from time to time. Where a carrier does see a virtually assured, continuous use for its own covered hopper cars, as is the case on BNSF (and other railroads in the West) for use in grain shuttle trains that operate with dedicated power as continuous, unbroken units, carrier investment is made in these types of cars. Because more and more western grain is moving in of shuttle trains, the private covered hopper car fleet of CHS (and, I believe, of some other NAFCA members) has declined.

9. It should go without saying, however, that shippers would not invest in private cars, through either purchase or lease (and, in most cases, multi-year leases of up to 15 years' duration) were those shippers not heavily reliant on rail transportation. Larger tank cars, of the type which carry the largest payload and receive the most favorable

rate economics, cost over \$90,000 each and covered hopper cars in excess of 5,000 cubic feet now cost in excess of \$60,000. Monthly rental costs for tank cars and for large covered hopper cars are in the vicinity of \$650.00. Shippers are not in the business of operating rail assets, and would prefer to allocate their capital resources to developing their own infrastructure. Private cars have been acquired by shippers who are greatly dependent on rail service. Private car acquisitions signal not only a rail-dependent shipper, but entrench that dependency because, once private car investments are made, they must be used.

II.

10. The great majority of the private fleet in existence and in use on BNSF was acquired when it was understood that shippers would furnish private cars and railroads would supply tracks on which to hold those cars when they were empty awaiting loading, at no charge in addition to the freight revenues earned by the railroads when moving the private cars under load. When a shipper such as CHS acquired private cars, the fleet was sized according to projected demand for the cars, as determined by business projections and the shipper's best judgment regarding car use cycles. I understand that the verified statements of other shipper-complainants are addressing many of the problems faced by a shipper in attempting to size a private car fleet, so I will not speak to the same matters in detail. I do wish to join others in stating that the goal of minimizing a private car fleet has not been made easier by railroad operating practices, including those of BNSF, that are inconsistent as a rule, rather than as an exception. That is not to say that shippers and their customers never contribute to delays in car use, but just that our delays are, to us, more predictable than those of the railroads.

11. In the mid to late 1990s, railroad service throughout the country, including BNSF service, took a serious downturn following the round of consolidations that began with the Burlington Northern-Santa Fe merger. As service worsened, rail transit times worsened. And as rail transit times worsened, private car fleets had to be expanded to continue to move products needed by rail users. Even as service improved on one railroad, continued poor service on connecting lines had ripple effects because of interline movements that produced slower total car cycles than previously. At the same time, as noted previously, railroads were steadily withdrawing from the business of car supply, and leaving that task more and more to their customers. Between 1995 and 2000, the private covered hopper car fleet grew from 152,000 to 227,000 cars, an increase of 50%. Neither those increases nor other increases in other segments of the private fleet were made in expectation that private car operators would in any way be penalized if their empty cars resided on railroad tracks.

12. On February 2, 2001, BNSF formally announced the institution of a new policy applicable to empty private cars held on BNSF tracks prior to loading, as well as certain other new policies including charges for diversion of cars, loaded or empty. Its announcement is attached as Appendix A. The program was to take effect on May 1, 2001, but the effective date was postponed by BNSF until July 1, 2001. Hereafter, I will refer to the program that took effect on July 1, 2001 as the "July 1 Changes."

13. The July 1 Changes had three basic components that were of concern to NAFCA and certain of its members in particular, including CHS. First, there was a regime of "demurrage" charges that applied to empty covered hopper cars handling grain and grain products while the cars were on BNSF tracks awaiting placement for loading.



Second, there was a regime of "storage" charges applicable on all other types of empty private cars when on BNSF track awaiting loading. Third, there were diversion charges applicable to loaded and empty private cars. NAFCOA regarded the storage and diversion provisions when applied to tank cars as "departure tariffs" subject to investigation under Ex Parte No. 328, and requested the Board to institute such an investigation. Because Ex Parte No. 328 applies only to tank cars, NAFCOA and certain of its members, including CHS, filed the complaint in this proceeding on August 29, 2001, attacking as unlawful all of the empty private car holding charge aspects of the July 1 Changes, not just confined to tank cars. Ultimately, the Board ruled that none of the July 1 Changes for tank cars were subject to Ex Parte No. 328. In this case, NAFCOA and certain of its members now ask the Board to find that the empty car holding charge provisions of the July 1 Changes are unlawful as to tank cars and other types of private equipment.

14. Those of the July 1 Changes applicable to empty covered hopper cars used for the transportation of grain and grain products were published by BNSF in its Demurrage Book 6004-A, Items 1040 and 1100. Under Item 1040, demurrage is to be computed from the first 12:01 a.m. after constructive placement, with Sundays regarded as a non-chargeable day pursuant to Item 140. One debit accrues for each demurrage day. Covered hoppers handling grain and grain products are accorded two credits per car under Table 1 of Item 1100. For each shipper location there is an end-of-month tally of debits and credits for empty private cars. As of July 1, 2001, there was a charge of \$25.00 per debit day. BNSF's practice has been to adjust its demurrage rates on grain cars seasonally, and the debit day charge was scheduled to increase to \$75.00 as of Au-

gust 1, 2001. Item 5010 of Demurrage Book 6004-A precludes relief from charges resulting from carrier bunching for empty cars awaiting loading.

15. For tank cars, and most other private equipment other than covered hopper cars handling grain and grain products, the July 1 Changes appear in BNSF Private Car Storage Book 6005, Item 1300. Under that provision, storage charges are to be assessed from the second 12:01 a.m. after constructive placement, with the first Saturday and Sunday excluded. On July 1, 2001, there was a rate of \$25.00 per chargeable day. Under Item 3100, there is limited relief for charges resulting from carrier bunching, as specifically and narrowly defined in that Item.

16. Since BNSF's original empty private car rules took effect, there have been changes to both the demurrage and storage provisions. BNSF's Demurrage Book charge per debit day for empty private cars is now \$50.00 per car. In April 2002, BNSF allowed one free diversion per car, and changed the empty car charges applicable under its Storage Book, adopting a three-tier approach; a charge of \$25.00 per day in areas where BNSF deemed track congestion to be "most likely," a charge of \$15.00 per day in areas where BNSF deemed congestion to be "likely," and a charge of \$10.00 per day in areas where congestion is "least likely," according to prior testimony of BNSF's Douglas Langston. BNSF also added a single Storage Book car credit if BNSF receives a line-haul movement from the empty private car that it held on its tracks. The relevant portions of the BNSF Demurrage Book and Storage Book are attached as Appendix B-1 and Appendix B-2 hereto, respectively.

17. BNSF's dual regime of private car demurrage and storage charges can produce many inconsistent results. If an empty, private covered hopper car intended for

grain or grain product transportation is constructively placed on a Sunday, Monday, Tuesday, Wednesday, or Thursday, the car will have two available "credit," or free, days before incurring a debit day under the Demurrage Book. On the other hand, if the car is an empty tank car, whether intended for grain product transportation or otherwise, if constructively placed it will incur chargeable days on the day after constructive placement, unless that day is a Saturday or Sunday, or unless BNSF receives a line-haul, in which case an additional non-payable day is allowed. These disparate programs apply even if the Demurrage Book and Storage Book private cars are held in the same BNSF yard at the same time for the same shipper.

18. If empty covered hoppers transporting grain or grain products incur demurrage, they are charged at the rate of \$50.00 per day. If another type of empty private car incurs storage charges at exactly the same point, the rate will be either \$10.00, \$15.00, or \$25.00 per day. In no case is BNSF being compensated for costs of car ownership; these are private cars, and even if they earn mileage allowances, those allowances are payable only when the cars are moving under load, pursuant to BNSF tariffs, and not while empty on BNSF track. Somehow, BNSF must believe that an empty private covered hopper car being held on BNSF track at a point in, for example, Iowa where the storage charge is \$10.00 per day because BNSF considers congestion at that point to be "least likely," causes five times as much congestion as a tank car held on the same track at the same point at the same time.

19. In his earlier statements on behalf of BNSF, Douglas Langston suggested that private cars and railroad cars should not be distinguished for demurrage purposes, and that neither should empty cars and loaded cars be distinguished. That is, Mr.

Langston appeared to be saying that, as long as shippers pay demurrage on loaded cars, they should pay it on empty cars because no one car occupies more space or causes more congestion than any other car. These outlooks caused me to examine BNSF's demurrage policies toward cars of different ownership as well as toward loaded and empty cars.

20. CHS and other shippers request as need be BNSF to furnish certain types of cars of railroad ownership for the movement of freight, including cars for soybean meal, as an example. Usually, facilities, at least those of CHS, relying on BNSF-supplied cars do so repetitively, and BNSF is aware that such facilities will routinely request carrier equipment. As an operating practice, which we have been brought to recognize through frequent conversations with BNSF personnel, BNSF attempts to meet these needs for carrier equipment by repositioning empty cars in the vicinity of those origins where BNSF expects the cars to be ordered for placement at shipper facilities. The shipper, however, is not assessed demurrage or any other charge while these empty carrier cars are in nearby yards awaiting a placement order. Only if and when the cars are ordered for a "want date" and the ordering facility refuses to accept the empty car on the want date do the demurrage provisions begin to apply on that empty car. Under Item 1040 of BNSF Demurrage Book 6004, demurrage does not begin until on or after a car order "want date," which is defined in Item 140 as the "date the customer requested the car for "loading."

21. If a private car is made empty, it is returned to its next loading "station" pursuant to BNSF tariff provisions. The shipper has no opportunity to request that the car be delivered on a specified "want" date; the car shows up whenever BNSF decides it should, and generally without predictability due to BNSF's frequently inconsistent transit

times. As soon as the private car arrives at the loading station, it is constructively placed if the shipper cannot accept it on private track.

22. BNSF appears to be demanding a more disciplined, clockwork type of private car handling than its own cars receive. If three empty cars – a private tank car, private covered hopper car, and BNSF covered hopper intended for soybean meal loading – arrive at a loading station on a Monday, and the private car shipper on Friday orders the two private cars to be spotted and gives a Friday want date for the BNSF car, the shipper pays nothing for the four days the BNSF car is empty awaiting placement. It will incur three chargeable days (Wednesday, Thursday, and Friday) for the tank car and will have to pay from \$10 to \$25 for each of those days unless BNSF gets the line haul, in which event one chargeable day will be subtracted. For the private covered hopper car, there will be four chargeable days (Tuesday, Wednesday, Thursday, and Friday), with the possibility of two credit days, and then a bill for \$50 for each net “debit day.”

### III.

23. When BNSF announced its new program for empty private cars in early February 2001, it also invited a number of shipper representatives to attend forums in Fort Worth regarding private car use. The meetings were held on March 22-23 and April 17-18. I attended both sessions on behalf of CHS and NAFCA.

24. At the March forum, BNSF explained that the new empty car holding charges were part of a broader effort at “improved asset velocity and resulting reduced asset requirements,” as noted on Appendix C, a page from BNSF's hand-out at the March 22 forum. These stated goals are consistent with BNSF's February 2, 2001 announcement (Appendix A hereto), where BNSF stated:

The intent of these changes is to improve asset utilization for our customers and effectively expand capacity without additional capital outlays.

25. Clearly, the "additional capital outlays" that BNSF hoped to avoid were its own capital outlays, while transferring those costs to its customers. From the time BNSF announced its new empty car holding charges, it made clear to those who inquired that, if they wished to avoid the holding charges, they should construct additional track capacity on their own industry property. This effort to pressure shippers to build additional track-age at their expense is one of the things that BNSF had in mind when it stated that it would "incent corrective behavior when shortcomings are identified," as shown on Appendix C.

26. To help make the imposition of track construction requirement more palatable, BNSF offered to apply any storage charges accrued in 2001 against the cost of constructing new industrial track. However, if track construction costs exceeded the accumulated empty car charges for 2001, the excess cost was at the shipper's expense, and ongoing maintenance for the track likewise was to be at shipper expense. For shippers able to convince BNSF that their facilities lacked adequate track construction space, BNSF agreed to consider leases of track on BNSF property. CHS entered into such a lease for one of its facilities served by BNSF, as discussed in more detail later in this statement. BNSF referred to this as a "floating" lease program under which BNSF would set a maximum allocation of rentable track space for a customer, but BNSF would have the sole right to pick the location of all BNSF track applied to that allocation. The lease program was addressed in some detail at BNSF's April 17-18 forum, as shown on Appendix D, which consists of two pages from BNSF's hand-out on April 17.

27. Representatives of several NAFCAs members (Ag Processing Inc, Archer Daniels Midland Company, Bunge North America, and Cargill, Inc.) were among those present at the two sets of BNSF forums. BNSF's program to "incent" industrial track construction, or alternatively to consider leases of BNSF track at rates up to \$30.00 per car-foot per year (see Appendix D), which appeared to be in excess of customary track lease rates, did not receive an enthusiastic reception from CHS or the other NAFCAs members present. BNSF, however, had yet another alternative available; it would discuss transportation contracts with individual customers. As suggested by BNSF's language shown on Appendix E (another BNSF March forum hand-out), and as reflected in my forum notes, these contracts would identify specific shipping corridors within which BNSF would provide "guaranteed" service. The shipper, in return, would have to guarantee BNSF a certain volume of traffic in that corridor and pay a penalty if the volume guarantees were not met. According to BNSF, this alternative would result in a reduction in the size of the shipper's private car fleet, thus enabling the shipper's remaining private cars to use fewer track feet when being stored empty. CHS and other shippers present balked at the idea of having to guarantee traffic volumes to BNSF in order to escape the new empty car charges. Moreover, there was considerable skepticism about whether any "guaranteed" service by BNSF would be backed up by penalty provisions on its part sufficient to fully reimburse a shipper whose facility had to shut down when "guaranteed" service was below par. So far as I am aware, no penalties ever offered by BNSF – and some of its programs do entail penalties for failing to supply railroad equipment within a certain number of days after cars are ordered – have ever been on anything but a per car basis; and even then, in modest per-car amounts. A per-car penalty cannot approach the

full costs a shipper will suffer when carrier service fails. CHS did not agree to pursue BNSF's "guaranteed" service alternative; from the reactions from other shippers present at the BNSF forums, I would be greatly surprised if that alternative was pursued by any of those companies.

28. In short, after attending BNSF's two forum sessions, I became convinced that BNSF's holding charges truly were a means to an end, and that the end was, as BNSF candidly stated from the outset, to compel a transfer of track infrastructure costs from BNSF to its customers and to bring about assured traffic volumes for BNSF.

#### IV.

29. Although some other Class I railroads have adopted their own versions of empty private car holding rules and charges, BNSF was, so far as I am aware, the first Class I railroad to maintain mandatory, pervasive empty car payment provisions applicable to virtually all types of private cars at virtually all times and places. Moreover, its daily demurrage rates applicable to covered hopper cars in grain and grain product service were on the verge of being seasonally increased to \$75.00 per car when the July 1 changes took effect, and most of NAFCA's shipper members are processors of agricultural commodities who operate that type of equipment. NAFCA believed it necessary to challenge BNSF's empty car provisions. Nevertheless, I'll now review the relevant tariffs of other Class I railroads insofar as they are known to me.

30. Canadian National Railway ("CN") had a private car storage tariff item applicable in 2001, attached as Appendix F-1. It contained no fixed limits on the number of private cars that could be held without charge. The essence of the tariff was the right of CN, after 30 days' notice to a shipper, to request disposition for immediate removal of



excess private cars. Over time, CN's approach has changed somewhat. Effective January 1, 2005, CN's tariff, attached as Appendix F-2, provides per car per day charges for empty private cars held on CN tracks in excess of "the customer's applicable storage agreement capacity." The ability of CN to charge for empty private car storage accordingly appears to be dependent on the terms of CN's storage agreement as negotiated with any given shipper. In the absence of a storage agreement, there appears to be no basis for assessment of an empty car storage fee. In any event, no shipper member of NAFCA has ever advised me that it has paid empty car storage charges to CN or has been threatened with such charges.

31. Effective October 1, 2001, Union Pacific Railroad Company ("UP") followed the lead of BNSF and published storage charges for empty private equipment, adopting a so-called average agreement format with a storage fee of \$25.00 per net private empty storage day. See Appendix G-1. In September 2001, E. I. Du Pont De Nemours and Company requested the Board to investigate the UP charges under Ex Parte No. 328 in Docket No. 42064. NAFCA filed a letter with the Board indicating its intent to participate in that proceeding. However, NAFCA and UP reached an agreement in August 2002 under which UP agreed to exclude all private cars of any type used for the transportation of grain and grain products from its storage charge program, and NAFCA thereafter agreed to withdraw its notice of intent to participate in Docket No. 42064. See Appendix G-2, a letter of August 14, 2002 on behalf of NAFCA to the Board, attaching a settlement agreement with UP. Because the majority of NAFCA's shipper members, who ultimately must pay any empty private car holding charges, are engaged in the transporta-

tion of agricultural commodities, the settlement agreement with UP resolved NAFCA's concerns with UP's empty car policies.

32. To the best of my recollection, in 2001, Norfolk Southern Railway Company ("NS") indicated its intent to publish empty private car storage charges but reversed its position and published no such charges.

33. I have very recently learned that, in or about 2001, CSX Transportation, Inc. ("CSX") published private car holding charges based on five days' free time applicable only at a very limited number of points on its system, which did not include any points at which NAFCA shipper members had loading facilities. I don't know how long those provisions remained in effect. Effective January 1, 2005, CSX published a tariff, reproduced as Appendix H hereto, containing private car storage charges, but allowing 20 days of demurrage credits, or free time, per car. The 20 days' free time per car is, as a practical matter, sufficient to render moot the possibility of any empty car holding charges in the overwhelming number of instances, and NAFCA has not viewed the CSX tariff as a work-a-day problem for that reason.

34. NAFCA has never sought to litigate or invoke the Board's procedures purely for academic reasons. As a practical matter, the empty car holding provisions of BNSF far and away are the most troublesome to NAFCA members.

V.

35. As indicated, CHS operates many facilities from which shipments of grain and grain products are originated in the western part of the United States. Some of those CHS facilities in which shipments originate in private cars are served by BNSF, but also by UP, Canadian Pacific Railroad ("CP"), and various regional or short line railroads.

36. At the end of 2004, CHS operated private cars, all but of which were under lease. The fleet at that time consisted of covered hopper cars and tank cars. The tank cars are used principally to transport vegetable oil, petroleum lubricants and asphalt and the covered hopper cars principally to transport feed grains and soybean meal. The CHS fleet is smaller than it was in 2000, when we operated covered hopper cars and tank cars, for a total of . The reduction in the size of the covered hopper car fleet is attributable to three factors: new covered hopper cars manufactured since 1980 have been of larger capacity than most of the then-existing covered hopper car fleet; grain shuttle trains of the type described above have been moving an increasing share of feed grains in the west, and shuttles provide improved cycle times because the railroads that operate them, including BNSF, offer positive economic incentives to induce shipper investment in rapid loading and unloading facilities; and because the two primary western carriers, BNSF and UP, are phasing out programs under which grain shippers had been prompted to lease private cars to the carriers in return for contractual commitments by the carriers to furnish those shippers with guaranteed loading capacity per month. BNSF has been placing new, large covered hopper cars in shuttle train service in lieu of relying on private car leases. I cannot attribute the reduction in the size of CHS' private car fleet to improved operational performance by the railroads, including BNSF, in the movement of private cars from origin to destination and back to next loading origin. In fact, the CHS tank car fleet, which is not susceptible to use in efficient shuttle trains, has increased in size partially due to unreliable, erratic rail service.

37. The July 1 Changes of BNSF were of great concern to CHS for a variety of reasons. First, they represented a reversal of a long-standing practice upon which CHS

and other shippers have relied; namely, the inclusion of empty private car holding tracks furnished by the railroad in return for the freight rate paid to the railroad. Tracks on which to hold empty private cars prior to loading are an integral part of each car use cycle, whether involving railroad or private cars. When a car is loaded, it is billed to destination and the loaded car is tendered to the origin railroad for movement. The shipper of the car is then entitled to have the car returned to its next loading station without additional charge over and above payment of the freight car for the loaded movement. BNSF, like other railroads, will reverse-route the empty private car to its last, prior loading station unless it is informed prior to release from the unload point to move the car to a different station other than the origin of the last loaded movement; if so informed, then the car is routed empty to the new loading station, likewise at no additional charge. BNSF's return empty car movement tariff provision does not require return of the empty car immediately to the shipper's loading facility, but only to a "station," which is a carrier service point, where the car can await the shipper's request to spot the car for loading.

38. When BNSF announced the July 1 Changes, they represented a serious potential threat to the operations of CHS. We were not certain whether those of our facilities where private cars were loaded on BNSF had sufficient industry track to accommodate empty cars prior to loading. Moreover, it occurred to us that, if BNSF could, with only a few months' advance notice, limit to two days the amount of time that an empty private car could reside on BNSF track before incurring charges, BNSF might consider itself entitled to remove free days altogether. At CHS, we concluded that some

effort had to be made to establish limits for changes in railroad private car practices having significant impact on shippers.

39. CHS set about to examine each of its BNSF-served facilities at which private cars were loaded to determine where existing industrial track might not be sufficient to accommodate all private cars presently used to originate traffic at those facilities. Fortunately, we identified only two such facilities, one at                      and the other at

. At other private car loading points served by BNSF, CHS in some cases already had a track lease from BNSF intended for holding loaded cars prior to shipment and was able to use that track for empty cars as well. At other facilities, the free time allowed by BNSF was sufficient to handle existing business volumes. CHS was and remains concerned that, if business conditions improve, CHS will be inhibited from taking advantage of those conditions through the addition of necessary private cars because of a combination of lack of capacity on which to expand industrial track (not to mention the cost of doing so) and the restrictive empty car free time provisions of BNSF. The July 1 Changes of BNSF in effect give BNSF the power to veto business expansion where private car use is required by making the addition of private cars too costly for competitive purposes. I must observe that if CHS determines to expand an existing facility it does not require a prior agreement from the electric company, the gas company, or any other supplier of essential services, nor would we face a penalty for increasing our use of electricity or gas.

40. An escape valve of sorts offered by BNSF for shippers seeking an alternative to the payment of empty private car holding charges was the lease of BNSF trackage. CHS attempted to pursue that alternative at two points;

. At , BNSF offered to lease approximately feet of "floating" track at \$20.00 per foot per year, or \$80,000 annually. is in eastern North Dakota not on the high density BNSF main line that runs through Minot. It is in a state that has been assigned a \$10.00 per day storage fee by BNSF because there is a low likelihood of congestion. Real estate values are low compared to other places where CHS operates facilities. In my judgment, \$4.00 per track foot per year would have been a fair and appropriate rental fee in ; yet BNSF asked for . CHS determined that it could not justify an annual track rental at and decided, instead, to expend capital to purchase the necessary track.

41. At , CHS had arranged to lease track from BNSF before the July 1 Changes took effect. Under that lease, which became effective on February 1, 2001 and expired in February 2005, the lease rate was per foot per year throughout the lease term. In November 2004, BNSF advised CHS that, upon expiration of the lease in February 2005, new annual lease rates would be imposed at for the first year, for the second year, for the third year, for the fourth year, and for the fifth year. CHS had no alternative but to accept those terms, even though we regard the rentals as exorbitant. It has been our experience that BNSF commingles CHS private cars utilizing the "floating" lease with all other manner of cars in the BNSF yards.

## VI.

42. Prior to the July 1 Changes, BNSF held empty private cars on BNSF track awaiting an on spot order for loading as part of the freight rate. After the July 1 Changes took effect, BNSF did not reduce its freight rates or pay any form of allowance to ship-

pers who built their own industry track to accommodate more empty private cars, who leased track from BNSF, or who incurred other expenses in attempting to accommodate the BNSF program, with the exception of those shippers who received a partial waiver of demurrage or storage charges accrued in 2001 as a contribution toward their track construction costs. On the other hand, for most commodities, including agricultural commodities, but by no means confined to agricultural commodities, BNSF rates have been increasing steadily and markedly, as I know from both my experience as a transportation official of CHS and from reading public documents such as BNSF's own filings with the Securities and Exchange Commission and transportation industry publications. Those of us who operate private cars are in effect paying more for transportation as a result of the July 1 Changes and receiving less from BNSF.

43. NAFCA and those of its members who are individual complainants, as shown in the Amended Complaint, believe strongly that BNSF acted improperly in suddenly placing severe restrictions on the use of its track for empty private cars in the face of private car fleets that had been acquired without contemplation of those rules and with only expensive, largely uncompensated, track construction or track lease alternatives. NAFCA and these shippers wish to state, however, that despite what we regard as clear legal impediments to the July 1 Changes, we recognize that it is unfair, even if not unlawful, to expect BNSF or any other railroad to provide unlimited trackage for the holding of unlimited quantities of empty private cars for unlimited periods of time. All other matters being equal, we agree with the observation made by Douglas Langston of BNSF in his earlier filings in this case that too many empty private cars were held on BNSF tracks for extended periods of 30 days or more, and we would regard that as an unwarranted

abuse of any legal prerogative shippers might have to use carrier track to hold empty private cars prior to loading.

44. We do not believe, however, that as little as one day's free time is a fair or appropriate measure for the use of carrier holding track without additional charge beyond the freight rate. Shippers relying on BNSF equipment do not face a similar restriction unless, as I understand it, they have ordered carrier cars and failed to accept them on the specified want date or have entered into a car assignment written agreement with BNSF and have expressly agreed to subject themselves to "demurrage" for non-acceptance of empty assigned cars when tendered for loading. No such agreements have been required of shippers using private cars. BNSF tenders them without predictability and expects virtually immediate acceptance by the shipper. NAFCA and the individually named Complainants nevertheless would not oppose storage charges as now assessed by BNSF on empty private cars of all types if given a reasonable number of free days, prior to the cars being placed for loading. NAFCA has attempted on at least two occasions under my direction to engage BNSF officials in discussions to seek an increase in BNSF's free time, but has been rebuffed. NAFCA intends to address these measures elsewhere in its testimony and in its argument.

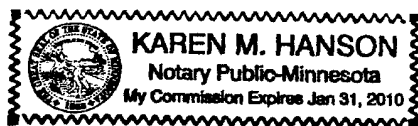


VERIFICATION

Dan Mack, being duly sworn, deposes and says that the foregoing statement is true and correct, to the best of his knowledge, information and belief.

Dan Mack

Subscribed and sworn to before me this 15<sup>th</sup> day of July, 2005.



Karen M. Hanson  
Notary Public

My commission expires 1-31-10.

BNSF

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Your World.™

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To: All BNSF Carload Customers

# MarketingNews

02/02/2001

## BNSF Private Equipment Policy

### BNSF Private Equipment Policy

To increase asset utilization for both BNSF and Private fleets, BNSF will be making changes to the current Private Equipment Policy. The changes will provide additional operational flexibility and increased capacity for our customers. The following changes become effective May 1, 2001 and will apply to both loaded and empty equipment held on railroad tracks.

" This policy will not supercede any provisions of existing contracts concerning the use of private equipment. However, if your contract refers to a rules tariff and that tariff changes, these changes will apply.

" Storage charges for loaded private equipment will be reduced from the current \$75/day to \$25/day.

" Storage charges for empty private equipment will be increased from the current No Charge/day to \$25/day.

" Storage charges will apply at origin, destination and any intermediate holding location.

" There will be no credits given. Under the current policy, one (1) credit is given for loaded private equipment.

" Charges begin after the 2nd 12:01AM after Constructive Placement until the request for placement to private track is received.

" Under the new policy, Saturdays, Sundays and holidays that fall between Constructive Placement and the 2nd 12:01AM are excluded. Once charges begin, Saturdays, Sundays and holidays will be chargeable.

" Refused equipment: Once loaded equipment is refused, charges will be assessed against the consignor of the load. Once empty equipment is refused, charges will be assessed against the lessee or owner of the equipment. In either case, once charges begin for refused equipment, Saturdays, Sundays and holidays will be chargeable (Prior to refusal, this Policy will assess storage charges, to the consignee, from the 2nd

12:01AM after Constructive Placement until refusal).

" Equipment held for disposition: Storage charges will be assessed from the 1st 12:01AM after return to BNSF tracks until disposition is received at the rate of \$25/day inclusive of Saturdays, Sundays and holidays.

" Equipment containing hazardous materials: a charge of \$75.00/day in addition to the standard storage charge of \$25.00/day will apply. Charges will run concurrent with storage charges.

#### Ancillary Issues:

" Intra-Plant Switches will remain at \$105. Under the new policy, empty equipment will not be chargeable if immediately followed by a loaded movement under either line-haul or switching rates of BNSF.

" Diversions Under the new policy, both loaded and empty diversions will be charged. (\$150 for a single car diversion with a maximum of \$450 for a multiple car diversion on a single BoL)

**The intent of these changes is to improve asset utilization for our customers and effectively expand capacity without additional capital outlays. By announcing these changes three months prior to implementation, we hope you will have necessary time to adjust your operations. By standardizing, simplifying, and automating the process we will improve our ability to deliver more effective services.**

If you have any questions regarding the new policy, please contact your Account Representative, or send us an e-mail at [CustomerInterface@BNSF.com](mailto:CustomerInterface@BNSF.com). You can also contact Douglas Langston, Director Equipment Utilization at 817-352-6322, or Ken Graham, Senior Manager Equipment Utilization at 817-352-6412 or Gary Bender, Account Manager - Chemicals at 410-539-2450.

**BNSF Demurrage Book 6004 – A**

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***Item 1040H - Cars Held for Loading – (Issued December 1, 2004 – Effective January 1, 2005) (Increase)***

Applicable to cars held for loading (See Exceptions).

Loading is the complete or partial loading of a car in conformity with BNSF loading and clearance rules, advice the car is available for movement, and the furnishing of forwarding instructions.

**RELEASE:**

- A. Date and time that BNSF receives forwarding instructions and advice that a car is available for movement and payment of any accrued charges from non-credit or cash (A) customers. Written instructions may be given to BNSF stating forwarding instructions will authorize release.
- B. Cars placed on industrial interchange tracks of a loader doing its own switching, including those tracks of an industrial switch line acting as Agent of loader, must also be returned to the industrial interchange track for release, as described in Paragraph A.
- C. Cars found to be improperly loaded at origin will not be considered released, as described in Paragraph A, until the load has been properly adjusted and clearance has been obtained.

**COMPUTATION:**

- A. Demurrage computation:
  - 1. Constructive Placement Time will be computed from the first 12:01 a.m. after constructive placement until order in time. (See exception 1).
  - 2. Industry Time will be computed from the first 12:01 a.m. after actual placement until released.
- B. If a car is placed prior to the car order want date, demurrage will be computed from the first 12:01 a.m. of the date for which it was ordered. Demurrage days will then accrue until the car is released.
- C. When the customer releases a car prior to the car order want date:
  - 1. If the car placement is prior to 12:01 a.m. of the date advice car is available for movement, time will be computed from 12:01 a.m. of date advice is received. Demurrage days will then accrue until the car is released.
  - 2. If car is placed on the same day as advice is received that car is available for movement, time will be computed from the first 12:01 a.m. following date advice is received. Demurrage days will then accrue until the car is released.
- D. On a reloaded car, demurrage will be computed from the first 12:01 a.m. after advice is received that the car is empty until the car is released as a load.
- E. One debit will be assessed for every demurrage day.
- F. For application of credits and charges see Item 1100.

(Item continued on next page)

**BNSF Demurrage Book 6004 – A**

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***Item 1040H - Cars Held for Loading (Concluded)***

**Exceptions:**

1. The provisions of this Item do not apply on shipments of Sugar (STCC 20-621 and 20-629) moving in Covered Hopper cars. For provisions to apply, see Item 1095 (Straight Plan Demurrage).
  2. This exception only applies to railroad controlled single car shipments and 108 cars or less unit grain trains moving in BNSF revenue line haul service. When constructive placement or actual placement is on a Thursday or Friday, the first Saturday is non-chargeable. All subsequent Saturdays are chargeable. (Exception: Does not apply to coal trains).
  3. The provisions of this Item do not apply to Scoots & Shuttles.
-

BNSF Demurrage Book 6004 – A

*Item 1100W - Calculation of Demurrage Charges and Applicable Credits (Continued)*

**Table 3**

**Transaction Type: Other than Loading or Unloading as covered by Item 1060**

Row	LUX Code	Car Type	Applicable Credits (See <u>Note 3</u> )	Chargeable Amount (Per Day)
1	X	All Types	0	\$ 75.00

**Table 4**

**Transaction Type: Loaded or Empty Private Cars held on Railroad Tracks as covered by Item 1070**

Row	LUX Code	Car Type	Applicable Credits See <u>Note 4</u>	Chargeable Amount (Per Day)
1	T	Loaded Covered Hoppers (Grain and Grain Products as defined in Note 5)	2	\$ 75.00
2	Q	Empty Covered Hoppers (Grain and Grain Products as defined in Note 5)	2	\$ 50.00
3	S	Loaded Covered Hoppers (Sugar STCC 20-621 and 20-629)	2	\$ 75.00
4	L	Empty Covered Hoppers (Sugar STCC 20-621 and 20-629)	1	\$ 25.00

**Table 5**

**Transaction Type: Refused Loaded Cars as covered by Item 1080**

Row	LUX Code	Car Type	Applicable Credits (See <u>Note 3</u> )	Chargeable Amount (Per Day)
1	Z	All Types	2	\$ 75.00

(Item continued on next page)

**BNSF PRIVATE CAR STORAGE BOOK 6005**

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***Item 1300C – Cars Held for Loading on Railroad Controlled or Public Delivery Tracks,  
(Issued December 1, 2004 – Effective January 1, 2005) (Increase)***

Applicable to empty private cars held for loading:

**A. Release:**

1. Date and time that BNSF receives forwarding instructions and advice that a car is available for movement and payment of any accrued charges from non-credit or cash (A) customers. Notice may be given to BNSF stating forwarding instructions will authorize release.
2. Cars found to be improperly loaded at origin will not be considered released, as described in paragraph A.1., until the load has been properly adjusted and clearance, if necessary, has been obtained.

**B. Computation and Charges:**

1. Charges will be assessed from the second 12:01 a.m. (Saturdays, Sundays and holidays within the calculation to the second 12:01 a.m. will be excluded) after actual or constructive placement of a car until the car is released.
  2. On a reloaded car, charges will be assessed from the second 12:01 a.m. (Saturdays, Sundays and holidays within the calculation to the second 12:01 a.m. will be excluded) after advice is received that the car is empty until the car is released as a load.
  3. Charges will accrue on all Saturdays, Sundays and holidays subsequent to the first chargeable day.
  4. Each chargeable day, or fraction thereof, will be assessed at the applicable rate in Items 1700 and 1800. When empty cars are held short of the waybilled destination the rate that will apply will be the rate applicable for the destination.
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**BNSF PRIVATE CAR STORAGE BOOK 6005*****Item 1700C - Calculation of Storage Charges & Applicable Credits – (Issued December 1, 2004 – Effective January 1, 2005) (Increase)*****Table 1 - Reference Item 1200**

(Loaded and Empty cars held for initial placement on private tracks)

Row	LUX Code	Car Types	Applicable Credits	Chargeable Amount (per day)
1	A	Loaded Private Cars	0	\$75.00
2	B	Empty Private Cars	0 (See Note 1)	See Item 1800

**Table 2 - Reference Item 1300**

(Car held for loading on railroad controlled or public delivery tracks)

Row	LUX Code	Car Types	Applicable Credits	Chargeable Amount (per day)
1	C	Empty Private Cars	0 (See Note 1)	See Item 1800

**Table 3 - Reference Item 1400**

(Car held for unloading on railroad controlled or public delivery tracks)

Row	LUX Code	Car Types	Applicable Credits	Chargeable Amount (per day)
1	D	Loaded Private Cars	0	\$75.00

**Table 4 - Reference Item 1500**

(Cars held for purposes other than loading, unloading or initial placement)

Reference Item 1450 (Cars held for delivery to connecting carrier)

Row	LUX Code	Car Types	Applicable Credits	Chargeable Amount (per day)
1	1	Loaded Private Cars	0	\$75.00
2	E	Empty Private Cars	0	See Item 1800

**Table 5 - Reference Item 1600**

(Refused cars)

Row	LUX Code	Car Types	Applicable Credits	Chargeable Amount (per day)
1	2	Loaded Private Cars	0	\$75.00
2	F	Empty Private Cars	0	See Item 1800

(Item continued on next page)



**BNSF PRIVATE CAR STORAGE BOOK 6005**

**Item 1800D - Geographical Rates Applicable to Empty Private Cars – Issued April 7, 2004 – Effective May 1, 2004**

(Applicable only when referenced is made to this Item)

State or Province	Rate	Stations		
Alabama	\$15.00	All		
Alberta	\$10.00	All		
Arkansas	\$15.00	Rate applies to all stations except as follows:		
	\$25.00	Bridge Junction Clarkdale Critco	Harvard Madlock Marion	River Junction Texarkana Turrell
Arizona	\$15.00	Rate applies to all stations except as follows:		
	\$25.00	Abra Adamana Alhambra Angell Antz Ashfork Athos Audley Beardsley Bellemont Berry Burnstead Canyon Diablo Castle Hot Springs Chambers Cheto Chino Clarkdale Congress Crookton Darling Date Daze Doublea Drake Eagle Nest El Mirage Ennis Fennemore	Flagstaff Franconia Getz Glendale Goldbadge Grand View Griffith Hackberry Harris Haviland Hibbard Hillside Holbrook Houck Joseph City Kayfour Kingman Kirkland Lizard Acres Lupton Maine Matthie McConnico McPhetridge Meath Navajo Nelson Peach Spring Penzance	Peoria Perkinsville Perrin Phoenix Pica Piedmont Pinta Powell Seligman Serenio Shipley Skull Valley Springerville Sun City Sunshire Surprise Topock Truxton Tucker Valentine Walapa Wayne Webb Wickenburg Williams Williams Junction Winslow Wittman Yampai Yucca

(Item continued on next page)

**BNSF PRIVATE CAR STORAGE BOOK 6005**

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**SECTION 3**

***Item 3100C – Claim Handling – (Issued December 1, 2004 – Effective January 1, 2005)  
(Increase) (Reduction)***

In order to be allowed relief, a claim must be presented to BNSF within 60 days of the billed date as shown below. (A)

Any claims not filed within 60 days of the billing date will be declined.

Edemurrage Claims: (R)

Claims can be filed electronically utilizing BNSF eDemurrage tool (register at [www.bnsf.com](http://www.bnsf.com)). No processing fee for filing electronically.

Written or Phone Claims: (A)

Written or phone claims must be supported by documentation stating fully the conditions for which relief is claimed, identifying contested cars by car initial, car number and location. Claims are to be sent to the following address. Claims sent to BNSF will be subject to a processing fee of \$50 for each disputed bill.

BNSF Demurrage Accounting  
12th Floor  
176 East Fifth Street  
St. Paul, MN 55101  
Fax: (651) 298-7787

Response to Claims:

If BNSF fails to respond to a claim within 30 days from the date of receipt, BNSF will accept the dispute as submitted and credit the account for the value of the disputed amount. (R)

**A. Improper Charges**

1. If, by error, storage charges are improperly assessed, charges will be adjusted to the amount that would have accrued but for such error.
2. Bunching will not be considered railroad error and no allowance will be made except as provided for in paragraphs 3.
3. Relief of storage charges caused by bunching will only be granted under the following conditions:
  - (a) Cars Tendered For Loading or Unloading.

(Item continued on next page)

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BNSF PRIVATE CAR STORAGE BOOK 6005

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*Item 3100C – Claim Handling (continued)*

- (1) When, as a result of an act or neglect of BNSF, cars originating at the same point on different dates, moving via the same route and consigned to one consignee at one point are bunched and tendered for delivery by BNSF in accumulated numbers, the consignee shall be allowed such credits as he would have been entitled to had the cars not been bunched, except as shown in Paragraph A.3.a.3, A.3.a.4 and A.3.a.5.
- (3) When, as a result of an act or neglect of BNSF, cars originating at different points and transported via the same route from a BNSF intermediate common point to destination, are bunched after interchange or arrival at the BNSF common point (in which event the date of interchange or arrival of the cars at the BNSF common point will govern in determining the bunching instead of the date of shipment) and are tendered for delivery by BNSF in accumulated numbers, the consignee shall be allowed such credits as he would have been entitled to had the cars not been bunched, except as shown in Paragraph A.3.a.3, A.3.a.4 and A.3.a.5.
- (4) Cars arriving at the serving yard or destination point on different days will not be considered bunched when tendered for delivery on the next scheduled switch day.
- (5) Cars arriving at the serving yard or destination point on holidays will not be considered bunched when tendered for delivery on the first day thereafter.
- (6) Item eliminated.
- (7) Claims for bunching will only be accepted by BNSF for review if received in writing, supported by a statement certifying the car initial and number, date and point of shipment and date and time forwarding directions were furnished, the date and time of interchange or arrival at the BNSF common point and date shipments are tendered for delivery, for each involved in the bunching claim. Example claim for as follows:

Car Number	Origin or Common Point	Date & Time Forwarding direction furnished or arrival at common point or interchange	Date shipment tendered for delivery
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- (8) Bunching for loading and unloading must be calculated separately.
  - (a) Item eliminated.
  - (b) Item moved.

B. Acts of God: In the event it is impossible for a loader, unloader or consignee to get to a car or to load or to unload a car due to acts of God, including, but not limited to flood, storm, earthquake, tornado, or to other severe weather or climatic conditions, the storage directly chargeable thereto will be adjusted, provided the impediment is at least two (2) days in duration.

(Item continued on next page)

# ***BNSF Private Equipment Forum***

What do We Mean by 'Service'?

**BNSF**



**When the topic of service improvement is discussed, we must agree on a common definition of what 'service' is:**

- Cycle days
- Miles per day
- Transit consistency
- Switch consistency
- On time performance versus transit goal

**But in the end, in order to drive improved asset velocity and resulting reduced asset requirements, we must be able to:**

- Accurately measure railroad and customer asset velocity/utilization
- Incent corrective behavior when shortcomings are identified

**How to do that...**

**BNSF**



## ***Storage Agreements***

### **What is it?**

- Floating Storage / No specific track assignment
- Operationally, cars held anywhere

### **Why have it?**

- Customer gains fullest benefit for allocated storage amount
- Recognize storing equipment is limiting ability to grow business
- Holding privates as storage is not accounted for in the rates
- Rationalize network to understand impact in critically congested areas
- Recent analysis indicates cost to build track significantly exceeds current lease rates
- Indemnify BNSF

**BNSF**



## ***Storage Agreement Process***

1. Customer requests space from Acct Mgr. / Marketing Rep
2. Reviewed by Operations & Service Design
  - Space available ?
  - Does requested lease impact operations ?
  - Is the area operationally constrained ?
3. Rate established based on pre-determined criteria (ranges)
  - \$ 10, 20 & 30 per foot per year
  - Determined by examining cost to build track today & constraints to Operations
  - Recognizes excess capacity in less constrained areas
4. Agreement issued by Staubach Company

**BNSF**



## ***How do Storage Agreements work?***

**Car arrives at storage location**

**Shipper/Receiver drives car to lease track in two ways**

- Automatic
- Overflow

**Order to spot stops storage clock (all hazardous & storage charges cease)**

- Performed through Service Support, CISS, or Waybill

**Initiates bill for Intra-Terminal switch (\$ 300) on loads**

- Empties are not billed today



CANADIAN NATIONAL RAILWAY COMPANY  
TARIFF CN 9000

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DEMURRAGE AND STORAGE

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Section	6B	STORAGE	1 <sup>st</sup> Revised Page	6-8
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ITEM 6510

EXCESS LOADING SUPPLY OF EMPTY PRIVATE CARS ON RAILROAD TRACKS

- A. Where the number of empty private cars being held by the railroad for the account of a shipper exceeds a two day loading supply (see Note 1), railroad may request, in writing, that shipper provide disposition of excess cars to a location off railroad's property. If, within thirty days of receipt of railroad's request, shipper does not provide disposition for immediate removal of excess cars from railroad's property or make alternate arrangement for the cars on terms mutually agreed to by the shipper and railroad, then all shipper's excess private cars located on the railroad's property at the end of such thirty day period, and at any time subsequent thereto, will be subject to a charge of \$35 per car per day or fraction thereof.
- B. Upon arrival of empty private cars, carrier shall give notice to the billed consignee (the "Consignee Notice" as provided in this tariff. If carrier is notified by the billed consignee within 24 hours after delivery of the Consignee Notice that the empty is not for its account, then the carrier shall only notify the car owner that the car is on hand awaiting disposition (the "Owner Notice"), cars so held will be subject to a daily storage charge, commencing with the first 00:01 following said Owner Notice, of \$30 per car per day for the first two calendar days and \$60 per car per day or fraction thereof, for each day thereafter until disposition instructions are received. Charges, if any, will be for the account of said car owner.
- C. The charges named in paragraph A of this item will also apply for the account of the billed consignee of empty private cars held by carrier where the billed consignee does not so notify carrier within 24 hours of delivery of the Consignee Notice that the subject cars are not for its account. Said charges will commence for the first 00:01 hours following the Consignee Notice, to date of railroad's receipt of notification that the subject car is not for its account.

**Note 1:** "Loading Supply" as used herein is defined as the average amount of loaded cars shipper tendered to carrier per day during the previous calendar month for revenue movement.

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ITEM 6520

STORAGE OF RAILWAY EQUIPMENT MOVING ON OWN WHEELS

- A. Railroad equipment held on railroad tracks that will move or has moved on its own wheels as freight under transportation charges is subject to storage charges. Notice of storage will be given and charges will be billed to the consignor if at origin or en route and the consignee if at destination.
- B. The number of storage days shall be the number of 24-hour periods, or fractions thereof, BETWEEN the first 00:01 hours after notice is given AND the time the railroad receives written disposition.
- C. Assessment of Charges:
1. Total the storage days accrued for all units of equipment released during the calendar month.
  2. Deduct one credit for each unit released from storage during the month.
  3. If a balance of storage days remains, such balance will be charged at \$35 per day.
  4. Charges will be assessed on a monthly basis
  5. will be computed separately for each storage location
- D. Cars in storage under this item are not subject to demurrage.





## SUPPLEMENT 1 TO TARIFF CN-9000-E

**ISSUED:** December 10, 2004  
**EFFECTIVE:** January 1, 2005, except as noted in Item 500

### STORAGE OF EMPTY PRIVATE RAILCARS

ITEM 6600

Storage charges and related storage agreements as well as equipment guarantees are specified in items 6610 – 6640.

### STORAGE - DEFINITIONS TO GOVERN

ITEM 6610

**EMPTY PRIVATE CARS:** Are defined as any private car owned or leased by individuals, firms, corporations or companies.

**GUARANTEED PRIVATE CAR PLACEMENT** refers to CN's service commitment to place empty private cars.

**STORAGE AGREEMENT** is negotiated and agreed to by CN and the owner, lessee, shipper or receiver of a private car. The storage agreement entitles CN to provide storage services for a specified number of cars at a specific location at a negotiated storage fee.

**STORAGE DAY** is defined as a twenty-four hour period or part thereof during which a railcar is stored on railroad track.

### STORAGE - EMPTY PRIVATE CARS

ITEM 6620

DESCRIPTION	EVENT/LOCATION	START	STOP
<b>PRIVATE EMPTY CAR STORAGE</b>	Cars available to order in on the next scheduled service and placed into stored status	First 00:01 hrs after notification of availability	23:59 hours of the car order date

**COMPUTATION OF CHARGES:** If the total number of cars in stored status and available to be ordered in on the next scheduled service exceeds the customer's applicable storage agreement capacity on any particular day, then: Each Chargeable day will be assessed at \$50.

**TIMING OF CHARGES AND INVOICING:** Charges will be calculated daily and bills will be issued on a bi-weekly basis.

**RESPONSIBILITY FOR CAR:** The shipper, receiver, owner or lessee is responsible for the car while in stored status according to the customer storage arrangement in place.

**PAYMENT RESPONSIBILITY – STORAGE AGREEMENT:** The assigned party named in the storage agreement will be responsible for payment of all charges.

**PAYMENT RESPONSIBILITY – NO STORAGE AGREEMENT:** Where no storage agreement exists, all charges incurred for storage will be assessed to the shipper, receiver owner or lessee (party responsible for the car)

**LIABILITY:** CN accepts no liability and the user of the storage arrangement releases CN from such liability, with respect to any damage, loss, or injury to the car(s) or its/their contents, while in stored status, except to the extent caused by the negligence or intentional acts of CN.

## ▲ (PA) CUMULATIVE INDEX OF ITEMS

This index is a partial amendment to the index in Supplement 23 which represents items shown in this tariff and the latest Supplement in which they appear.

ITEM NUMBER	SUPP NUMBER	ITEM NUMBER	SUPP NUMBER	ITEM NUMBER	SUPP NUMBER	ITEM NUMBER	SUPP NUMBER
35-B	30	4710-B	30	6070-A	30	9040-A	30
1090-A	30	4800-B	33	7040-A	30	9045-A	30
1100-B	25	5070-A	30	7050-A	30	9050-A	30
2110-B	32	5100-A	30	8000-A	30	9061-B	30
3110-A	32	6010-A	31	8500-B	30	9062-A	30
4440-A	30	6011-A	31	9005-A	30	9063-A	30
4610-A	30	6050-G	32	9010-A	30	9082	25
4620-A	30	6055-A	30				

### SECTION 16 STORAGE RULES AND CHARGES

ITEM	APPLICATION
4800-B	<p><b>STORAGE OF PRIVATE EQUIPMENT</b> (See Exception)</p> <p>Effective October 1, 2001, Union Pacific Railroad will implement a new storage fee structure for <u>private empty equipment</u>. This new structure is part of Union Pacific's effort to reduce congestion and facilitate yard and terminal fluidity. Customers (defined for the purpose of this item as consignee of the empty rail car) will be subject to a storage charge on empty privately marked tank cars and privately marked covered hoppers, if the railcar's prior movement carried a STCC code listed in this item. Cars that are tendered with commodities referencing 49-series HAZARDOUS MATERIAL Codes (HZMC) are subject to the same rates, rules and regulations as their respective 28/29-series Standard Transportation Commodity Codes (STCC) listed herein.</p> <p>This policy will not supersede any provisions of existing contracts concerning the use of privately marked equipment. If your contract includes a rules tariff provision stipulating that new policies and provisions, as they are adopted by the railroad, are applicable to the contract in question, then the NEW Private Empty Equipment Storage policy and the fee structure are applicable to your railcar.</p> <p><b>EXCEPTION:</b> Provisions of Item 4800-series, UP 6004-series, will not apply to private cars being held on tracks at or adjacent to non-railroad repair facilities for cleaning, lining, relining, maintenance, modification or repair.</p> <p><b>STORAGE CHARGES</b></p> <p>A customer will receive a bill when net private empty car storage days are equal to or greater than one hundred net empty car days per customer location.</p> <p>Net chargeable storage days equals debits minus credits.</p> <p>The storage fee will be \$25 per net private empty storage day.</p> <p>Customer will be subject to a storage charge for all privately marked cars that in the prior movement carried any STCC codes listed in the attached document.</p>

(Continued on following page)

full costs a shipper will suffer when carrier service fails. CHS did not agree to pursue BNSF's "guaranteed" service alternative; from the reactions from other shippers present at the BNSF forums, I would be greatly surprised if that alternative was pursued by any of those companies.

28. In short, after attending BNSF's two forum sessions, I became convinced that BNSF's holding charges truly were a means to an end, and that the end was, as BNSF candidly stated from the outset, to compel a transfer of track infrastructure costs from BNSF to its customers and to bring about assured traffic volumes for BNSF.

#### IV.

29. Although some other Class I railroads have adopted their own versions of empty private car holding rules and charges, BNSF was, so far as I am aware, the first Class I railroad to maintain mandatory, pervasive empty car payment provisions applicable to virtually all types of private cars at virtually all times and places. Moreover, its daily demurrage rates applicable to covered hopper cars in grain and grain product service were on the verge of being seasonally increased to \$75.00 per car when the July 1 changes took effect, and most of NAFCA's shipper members are processors of agricultural commodities who operate that type of equipment. NAFCA believed it necessary to challenge BNSF's empty car provisions. Nevertheless, I'll now review the relevant tariffs of other Class I railroads insofar as they are known to me.

30. Canadian National Railway ("CN") had a private car storage tariff item applicable in 2001, attached as Appendix F-1. It contained no fixed limits on the number of private cars that could be held without charge. The essence of the tariff was the right of CN, after 30 days' notice to a shipper, to request disposition for immediate removal of

excess private cars. Over time, CN's approach has changed somewhat. Effective January 1, 2005, CN's tariff, attached as Appendix F-2, provides per car per day charges for empty private cars held on CN tracks in excess of "the customer's applicable storage agreement capacity." The ability of CN to charge for empty private car storage accordingly appears to be dependent on the terms of CN's storage agreement as negotiated with any given shipper. In the absence of a storage agreement, there appears to be no basis for assessment of an empty car storage fee. In any event, no shipper member of NAFCA has ever advised me that it has paid empty car storage charges to CN or has been threatened with such charges.

31. Effective October 1, 2001, Union Pacific Railroad Company ("UP") followed the lead of BNSF and published storage charges for empty private equipment, adopting a so-called average agreement format with a storage fee of \$25.00 per net private empty storage day. See Appendix G-1. In September 2001, E. I. Du Pont De Nemours and Company requested the Board to investigate the UP charges under Ex Parte No. 328 in Docket No. 42064. NAFCA filed a letter with the Board indicating its intent to participate in that proceeding. However, NAFCA and UP reached an agreement in August 2002 under which UP agreed to exclude all private cars of any type used for the transportation of grain and grain products from its storage charge program, and NAFCA thereafter agreed to withdraw its notice of intent to participate in Docket No. 42064. See Appendix G-2, a letter of August 14, 2002 on behalf of NAFCA to the Board, attaching a settlement agreement with UP. Because the majority of NAFCA's shipper members, who ultimately must pay any empty private car holding charges, are engaged in the transporta-

ORIGINAL

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By Hand Delivery

206042

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

Re: Docket No. 42064, E. I. DuPont de Nemours and Company -- Protest and Petition for Investigation

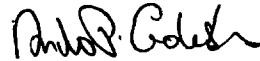
Dear Secretary Williams:

By letter dated August 5, 2002, you have been advised by counsel for E. I. DuPont de Nemours and Company ("DuPont") that negotiations between it and Union Pacific Railroad Company ("UP") have been concluded and that, upon execution of a written agreement between DuPont and UP, DuPont will notify the Board that it will withdraw its protest and petition in the captioned proceeding.

North America Freight Car Association ("NAFCA") has notified the Board of its intent to participate in this proceeding. This letter is to advise the Board NAFCA and UP have reached an agreement regarding the withdrawal by NAFCA of its Notice of Intent to participate in this proceeding upon final settlement and resolution of DuPont's interests. A copy of the agreement between NAFCA and UP is attached hereto. Please note that it contains UP's consent to NAFCA's withdrawal, without prejudice to the interests of NAFCA or its members.

Accordingly, NAFCA requests the Board to issue an appropriate order reflecting the terms of the agreement reached in this proceeding between UP and NAFCA, including withdrawal, without prejudice, by NAFCA.

Respectfully submitted,



Andrew P. Goldstein  
Attorney for  
North America Freight Car Association

cc: All Parties

Enclosures

APG/rmm

Law Department

UNION PACIFIC RAILROAD COMPANY



1416 DOOGUE STREET  
ROOM 830  
OMAHA, NEBRASKA 68179-0001  
FAX (402) 271-5610

August 12, 2002

Via UPS Next Day Air

Andrew P. Goldstein, Esq.  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K Street, N.W., Suite 600  
Washington, D.C. 20037

RE: Docket No. 42064, E. I. Du Pont de Nemours and Company – Protest and Petition for Investigation

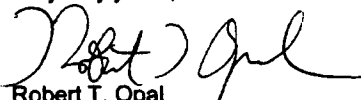
Dear Mr. Goldstein:

This letter is to memorialize our settlement agreement in the above proceeding.

Union Pacific Railroad Company and North America Freight Car Association (NAFCA) agree as follows:

- (1) At such time as UP and E. I. Du Pont de Nemours and Company reach a settlement agreement in this proceeding, NAFCA may withdraw without prejudice.
- (2) UP will provide not less than six months' notice of any change in its storage program for empty private cars that would make that program broadly applicable to equipment used for grain or grain products. It is intended that this commitment will extend to any broad-based imposition of storage charges for such equipment applicable to events similar to those which UP's current storage charges apply, regardless of what such charges may be called.
- (3) UP reserves the rights to impose storage charges for private cars on individual shippers of grain or grain products, provided UP gives not less than 30 days' actual notice of such charges. By entering into this agreement with UP, neither NAFCA nor any of its members shall be deemed to acknowledge that any such charges are in any respect proper or to waive any right to challenge any such charges.

Very truly yours,

  
Robert T. Opal  
General Commerce Counsel  
Phone: (402) 271-3072

Accepted for North America Freight Car Association

By: Andrew P. Goldstein

Date: 8-14-02



CSXT 8100

ORIGINAL PAGE VIII-D-9

**DEMURRAGE SECTION VIII - D**

**(A) DEMURRAGE & STORAGE APPLICATION – ITEM 8075**

Demurrage Application	Car Equipment as Published in: The Official Railway Equipment Register	Loading Credits	Unloading Credits	Daily Charge
Railroad cars, including: "railroad controlled private equipment"	Railroad equipment	1	2	\$60 .00
		Origin Credits	Destination Credits	Daily Charge
Empty cars and locomotives moving on own wheels in revenue service (STCC: 37 411 XX and 37 422 XX)	Railroad equipment and Industry controlled private railcars	1	2	\$60 .00
		Origin / Destination Credits or Credits in Transit		Daily Charge
All shipments for other than loading or unloading	Railroad equipment and Industry controlled private railcars	1		\$60 .00
<b>Storage Application</b>		Empty Cars	Loaded Cars	Daily Charge
Private marked cars, excluding: "railroad controlled private equipment"	Industry controlled private railcars carrying hazardous material or other than hazardous material. Hazardous materials list: Table, Section 172.101, Tariff BOE 6000-Series.	20	2	\$40 .00

(A) - Increase

ISSUED OCTOBER 20, 2004

EFFECTIVE JANUARY 1, 2005

**CSX TRANSPORTATION**  
Commercial Administration  
500 Water Street  
Jacksonville, FL 32202





**EXHIBIT NO. 2**

**VERIFIED STATEMENT  
OF  
RANDY NEUMAYER  
ON BEHALF OF  
ARCHER DANIELS MIDLAND COMPANY**

1. My name is Randy Neumayer. I am Senior Vice President, Transportation, of Archer Daniels Midland Company ("ADM"). ADM is a diversified agribusiness company that merchandises grain domestically, exports grain, and produces a variety of grain products including products of soybeans such as soybean oil and soybean meal, products of corn such as liquid corn sweeteners and ethanol, and products of wheat, mainly flour.

2. ADM operated private cars in 2004, up from in 2000. The increase in cars between 2000 and 2004 is essentially attributable to the acquisition by ADM of Minnesota Corn Processors ("MCP") in 2002, along with of MCP's private cars. The private car fleet contains approximately tank cars, both owned and leased, and a total of covered hopper cars of three basic types: gravity unload general purpose cars, pressure differential cars, and air slide cars. The latter two categories of covered hopper cars are used to handle dry bulk corn products and flour. They are in short supply on most railroads, including BNSF Railway ("BNSF"). General purpose covered hopper cars are furnished by railroads, including BNSF, at some times and for some purposes, but generally not quickly enough or in adequate quantities to meet demand, except for grain shuttle trains. BNSF and other railroads do not furnish tank cars. The ADM private fleet was acquired to meet those and other deficiencies in carrier car

supply, as discussed more fully later in this statement, and not because ADM desires to spend its money on railroad equipment.

3. ADM owns or operates, itself or as part of joint ventures, facilities served by every Class I railroad and many regional or short line railroads, including 45 facilities on BNSF at which shipments are originated. These BNSF-served facilities are located in Illinois, Colorado, North Dakota, Wyoming, Nebraska, Iowa, Minnesota, Texas, Kansas, Missouri, Washington, Tennessee, and Oklahoma. In most cases where BNSF provides service, it is the only serving carrier. BNSF also reaches a large number of ADM customers as the only serving carrier. ADM's facilities originate shipments of feed grains, wheat, flour, oil seeds, soybean products, corn products, peanut products, seed oils, and related products. Without a private car fleet, ADM could not be assured that its corn processing, soybean processing, and flour milling facilities would receive a sufficient and timely supply of raw materials (it is commonplace for processing facilities to rely on rail transportation of inbound corn, soybeans, and wheat because truck shipments from local sources inevitably fall short of necessary input), and outbound shipments of products would come to a standstill, particularly at processing facilities utilizing tank cars or specialty covered hopper cars. Private cars are also essential to meet ADM's commitments to its customers, who often lack storage capacity or receive non-fungible commodities that cannot be commingled and must be unloaded directly from rail car into a processing function. To reduce inventory costs, more and more customers are seeking timely delivery of oils, sweeteners, and other ingredients used in the customer's processing operations, and ADM has found it exceedingly imprudent to rely on a timely supply of carrier

equipment, including BNSF equipment, even where the carriers undertake to provide an appropriate type of covered hopper car.

4. ADM has been careful to avoid acquiring more private cars than are considered absolutely necessary to keep its facilities functioning efficiently and its customers served promptly. It is very expensive to either purchase or lease tank cars or covered hopper cars. The prices for new tank cars and covered hopper cars have increased sharply in recent years and now exceed \$80,000 for the former and \$70,000 for the latter. Lease rates are over \$600.00 per car per month for larger, more efficient cars. ADM seeks not only to minimize these expenses, but would eliminate them entirely if possible.

5. Because private cars cannot be eliminated entirely, ADM closely monitors the size of its private car fleet. Before it acquires private cars – as it sometimes must particularly when existing leases expire – ADM analyzes car cycle times from the origins at which the cars will be utilized and attempts to assess projected business volumes from those origins. These have been the two fundamental underpinnings of ADM's fleet sizing and are, I believe, the same two basic parameters analyzed by railroads such as BNSF when attempting to size their own fleets. Track capacity for empty cars was not an issue for ADM until BNSF instituted its holding charges in 2001 and has not caused ADM to incur penalties on other railroads.

6. Unfortunately, our cycle time analyses, including those on BNSF, normally establish wide variances in transit times for both loaded and empty cars. These variances are not within the control of ADM. The BNSF website offers shippers access to BNSF's carload transit schedules between any two given points. Using that website, ADM developed the current estimated transit times for loaded cars moving from Have-

lock (Lincoln, NE)) to Redlands, CA, as shown on Appendix A-1, and for empty cars returning from Redlands to Havelock, as shown on Appendix A-2. Appendix A-1 shows estimated transit time from Havelock to Redlands of 7 days on Monday, Tuesday, Wednesday, Friday, and Saturday; 7 days 13 hours on Sunday; and 8 days on Thursday. For the empty return trip, however, as shown on Appendix A-2, estimated transit varies from 8 days 5 hours two days a week to 9 days 5 hours on two other days, 10 days 5 hours on the fifth day, 11 days 5 hours on the sixth day, and 12 days 5 hours on the seventh day.

7. It is totally unrealistic to expect that loaded or empty cars can or should be held for shipment only on those days where faster BNSF transit schedules are indicated on its website. First, the transit times posted on the website are followed by a website admonition to BNSF's customers that the scheduled times are an estimate and not a commitment of any sort. Second, consignees and shippers need their industrial track space for a variety of plant operating functions and cannot afford to hold otherwise unneeded cars for shipment on a subsequent day just because BNSF may or may not provide more rapid service on those days.

8. Appendix B consists of three pages that depict the loaded and empty transit times on BNSF for loaded and empty private car cycles (loaded and empty trips) between ADM's soybean processing plant at Havelock and an ADM customer at Redlands, between January and June 2005. These are not selected sample movements but all complete cycles between those two points during the 22 weeks surveyed. The results of this survey, which I believe are symptomatic of BNSF service generally, show unmistakably that actual BNSF performance per shipment varies substantially not merely from

scheduled BNSF transit time, but from average performance levels between the same two points.

9. The study involved soybean oil shipments from Lincoln to Redlands and empty car returns from Redlands to Lincoln. All shipments took place in tank cars operated by ADM. The loaded transit time average for the outbound shipments was 9.98 days. The transit time for the empty return shipments averaged 13.7 days, or 13 days 17 hours.

10. The first five columns of Appendix B, labeled (A) through (E), show, respectively, car number, shipment date, received date, origin, and destination. All loaded cars originated in Havelock and terminated in Redlands, and all empty cars originated in Redlands and terminated at Havelock. Column (G) shows the actual transit time for each car, and Column (H) shows the average transit time for all cars in both empty (9.98 days) and loaded (13.7 days) status. Column (I) shows the variance in days between each car's actual transit time, loaded or empty, and the average transit time for loaded and empty cars in the sample. For instance, the loaded car shown in line 1 made the trip in 1.98 days less than the group average and the empty car in line 2 made the trip in 4.7 days less than average. Column (J) shows the total variance -- the sum of Columns (H) and (I) -- for each round-trip cycle, such as in lines 1 and 2 of Appendix B.

11. The remaining three columns on Appendix B, Columns (K) through (M), compare the performance of the study trips with the scheduled performance shown on BNSF's website for loads moving from Havelock to Redlands and empties moving from Redlands to Havelock. BNSF website schedule times shown on Appendix B are the total transit hours for a week taken from Appendix A divided by seven to produce a daily av-

erage. Column (K) shows, for example, the BNSF estimated schedule time for the line 1 loaded car moving from Havelock to Redlands as being 7.2 days, or 19 hours less than the actual transit time of 8 days experienced by that particular car. The empty car shown on Appendix B line 2 traveling from Redlands to Havelock actually took 9 days when compared with BNSF's scheduled transit time of 9.77 days, or slightly less than the website schedule. The net turn variance, Column (M), shows that the actual load-empty cycle represented by lines 1 and 2 of Appendix B is 1.57 days different than the scheduled transit cycle time for a Havelock-Redlands transit cycle. All cycle pairs on Appendix B can be interpreted similarly.

12. To summarize, BNSF's estimated scheduled transit time on loads from Havelock to Redlands was 7.2 days versus actual average transit time of 9.98 days, so that actual performance for loads was approximately two and ½ days longer than scheduled performance. For the empty movement, the BNSF schedule estimated 9.77 days versus an actual average of nearly 14 days, so that average actual performance exceeded average scheduled performance by over 4 days. When each load-empty cycle is combined, there is a net average variance of 5.06 days per cycle from the average transit time for the 44 load-empty pairs and of 6.92 days from BNSF's website schedules (App. B, p. 3).

13. Appendix B also discloses individual trip performance clearly. It shows that specific loads exceeded average performance on occasions and that empty returns exceeded average performance on occasions. Actual loaded transit times exceeded BNSF estimates in each and every instance and empty actual transit times exceeded BNSF estimates in out of the trips.

14. One of the important lessons to be learned from this data is that most transit cycles are completed in unpredictably shorter or longer times than "normal," which makes it extremely difficult, if not impossible, to size a private car fleet to a level requiring a constant, predictable amount of track space. When cars arrive more quickly than expected, they must be stored on tracks, and when they arrive less quickly than expected, there must be supplemental car capacity available. The fact that empty return moves vary more than outbound loads contributes directly to fleet sizing issues. It is disappointing that BNSF chooses to disregard its own service inconsistencies; its June 1, 2005 website "Guide to Demurrage Private Car Storage and Other Miscellaneous Charges" advises private fleet operators to "make sure cars on hand never exceed private storage and spot capacity," an admonition which BNSF's service makes literally impossible to follow.

15. It is difficult to understate the significance of erratic rail service in sizing a private fleet. While some variances in car cycle time are due to customers who retain cars before unloading them, even those types of occurrences can also be traced in part to erratic rail service, which forces ADM, as a vendor and processor, to put more loaded cars in the pipeline than otherwise would be necessary if service were more predictable. Customers therefore sometimes receive more loads than they need at one time, and retain loaded cars for more time than is ideal. Where customers retain loaded cars for reasons not related to rail service, the customers' practices normally are predictable to ADM. Erratic rail service, however, is predictable only in the sense that one knows it will occur, but not in frequency or dimension.

16. Shutting down a grain processing facility for lack of rail equipment, service, or any other reason is a hugely expensive proposition and one which ADM seeks to



avoid. Plant shut-downs or slow-downs increase not only operating costs, but have negative consequences such as idle plant labor, failure to meet customer delivery commitments resulting in efforts to find alternative higher-priced alternative trucking, and reduced sales volume. To avoid such consequences, ADM cannot maintain a private car fleet pared to the bare minimum size that might suffice if rail service always functioned optimally. Instead, our fleet must contain a cushion to compensate for not merely vagaries in railroad operating practices, but the inevitable blizzards, or other causes of interrupted rail service over which railroads have no control.

17. The size of private car fleets also are influenced directly by railroad policies. Some railroads, including BNSF, have advised ADM to acquire equipment, such as general purpose covered hoppers, similar to that operated by the railroad because the railroad knows that it will not be able to meet anticipated levels of demand with its own fleet. On other occasions, BNSF and other railroads have simply stopped providing their own equipment for certain transportation, notably dried distillers grain, a significant by-product of the ethanol producing process that is used as an animal feed. Yet another reason for increasing the private car tank car fleet is that BNSF contracts are imposing increased minimum volume requirements which can be met only through additional tank car capacity.

18. When BNSF announced in February 2001 that it was abandoning its time-honored practice of furnishing holding tracks for empty private cars prior to loading at no cost other than the freight rate paid for the loaded movement of the car, ADM was greatly concerned. ADM's private fleet of approximately        cars at that time had not been acquired in contemplation of any such policy. Our leased cars were mainly subject to

multi-year leases of up to 15 years' duration and could not simply be retired both for reasons of car costs and operating necessity. The BNSF private holding car charges confronted ADM with difficult and costly choices: construct additional industry track where possible, mainly at ADM expense; lease holding track from BNSF where possible at rates demanded by BNSF, even if higher than the market value; incur the holding charges; or reduce business volumes. Resort to truck transportation was not an economically viable alternative; if trucks had been an alternative ADM would not have acquired costly rail cars in the first instance.

19. Eight major ADM originating facilities were most severely impacted by the BNSF empty holding car charges which took effect on July 1, 2001.

TABLE 1

<u>Facility Location</u>	<u>Business Activity</u>	<u>Industry Trackage</u>
North Kansas City, MO	Flour Milling	9,600 feet
Cheney, WA	Flour Milling & Wheat Shipments	2,400 feet
Arkansas City, KS	Flour Milling & Wheat Shipments	5,400 feet
Enid, OK	Flour Milling & Wheat Shipments	6,900 feet
Lincoln, NE	Flour Milling & Wheat Shipments	4,500 feet
Lincoln, NE	Soybean Processing	25,380 feet
North Kansas City, MO	Soybean Processing	5,900 feet
Marshall, MN	Corn Processing	24,805 feet

As can be seen above, at each of the eight facilities, ADM had substantial industry trackage, ranging from a low of approximately one-half mile at Cheney to approximately five miles at the soybean processing facility at Lincoln and the corn processing facility at Marshall. It is difficult to regard these facilities as having been constructed with minimal

industry track investment and with a view toward taking unfair advantage of BNSF's practice of holding empty private cars on carrier track without charge.

20. Nevertheless, despite having extensive private industry track at the eight identified facilities, ADM began to incur substantial empty car holding charges under the program instituted by BNSF on July 1, 2001. Between July 2001 and April 2005, ADM incurred the following demurrage and storage charges for empty private cars awaiting loading at each facility identified in Paragraph 19 in the following amounts:

TABLE 2

<u>Facility</u>	<u>Charges Incurred</u>
N. Kansas City (Milling)	
Cheney	
Arkansas City	
Enid	
Lincoln (Milling)	
Lincoln (Soybean Processing)	
N. Kansas City (Soybean Processing)	
Marshall	
TOTAL	\$

In addition, ADM incurred a total of \$2825 in empty private car holding charges at Dodge City, KS, Plainview, TX, Colton and Grafton, N.D., and British Columbia, Can. As part of a law suit settlement with BNSF, ADM agreed to pay post-April storage charges issued by the BNSF until this case is resolved. By virtue of an agreement reached recently between BNSF and ADM to resolve an outstanding civil lawsuit, ADM is not seeking in this proceeding to recover as an award of damages by the Board any empty car holding charges paid to BNSF.

21. Despite the significant industrial trackage built by ADM at each of the locations identified in Table 1, private trackage was insufficient to accommodate ADM's

empty cars, both covered hoppers and tanks, within the free time allocated by BNSF without disruption of operations. A variety of different activities take place on industrial track, so that not all industrial track is available for holding private cars, either empty or loaded. The serving carrier enters upon the industrial track to place empties and to remove loads in both railroad and private equipment. Railroad cars on private track are subject to demurrage and must be given preference of movement. Private cars are switched from location to location within the industry as needed for loading and unloading, and sometimes to be cleaned. Daily production at a processing facility varies according to market conditions. It is not possible to operate a processing facility as a matter of rigid, repetitive, daily routine.

22. To avoid as much as possible the imposition of BNSF's empty car charges, ADM evaluated its ability to construct additional holding track at all eight facilities. We concluded that we did not have that capacity at any of the eight facilities except the soybean processing plant located at Havelock (Lincoln). There, ADM attempted to negotiate an agreement with BNSF under which more than \$ \_\_\_\_\_ in track construction costs necessary to avoid the BNSF holding charges and to reduce the volume of ADM cars on BNSF tracks would receive reasonable reimbursement compensation from BNSF. Those negotiations did not proceed swiftly and the industrial track construction has not been completed. BNSF compensated ADM partially for the cost of that construction but did not credit any of ADM's accumulated empty car demurrage or storage charges. Before it imposed its July 2001 empty car charges, BNSF had not approached ADM to discuss the possibility of ADM constructing additional holding tracks on ADM land at Havelock or any other ADM facility in return for compensation from ADM.

23. To temper the impact of BNSF's empty private car holding charges, ADM also examined the possibility of leasing trackage from BNSF. ADM attempted to lease tracks at ADM Milling and ADM Processing in North Kansas City but was informed by BNSF that there was no track available. We decided to construct tracks at Havelock as we owned enough land adjacent to the plant. No other new leases were obtained.

24. BNSF is the only railroad to which ADM has incurred any charges for holding empty private cars prior to loading. Several other carriers serving ADM originating facilities have empty private car holding charges, but all differ in some significant respect from the program of BNSF. Putting aside the legal question of whether BNSF's demurrage and storage charges are appropriate in the first instances, they plainly are unrealistically harsh in limiting free time.

25. The demurrage charges applicable to covered hopper cars handling grain and grain products allow no relief for bunching; that is, when BNSF delivers too many cars at one time and too few at other times. If an empty tank car arrives at an ADM facility on a Monday, it incurs storage charges beginning at 12:01 a.m. Wednesday morning; the car, in other words, receives as little as one free day if it is delivered late in the day. Ultimately, that tank car might receive a second day's credit if BNSF receives a line haul; but, when the car arrives at the ADM facility as an empty, it is not always possible to determine whether the car will be routed via BNSF when loaded or via another carrier. On the other hand, if an empty covered hopper car arrives at the same ADM facility on the same day, it will receive two credit days. Moreover, when chargeable days are incurred, the daily rate for the covered hopper car is \$50.00, while for the tank car it is \$10.00, \$15.00, or \$25.00, depending on geographic location. On the face of it, therefore,

BNSF's rules seem to establish conflicting incentives for removing particular types of cars from BNSF track. As a practical matter, however, ADM cannot respond to any such incentives because at many of its facilities, such as those processing soybeans, a "crush" produces both tank car and covered hopper car products and both types of cars are needed at the same time. As a result, we face much higher charges on covered hoppers than on tank cars for no apparent reason.

26. ADM's real problem, however, is simply lack of adequate free time or free holding track space on BNSF. A grain processing plant cannot be run effectively, if at all, if it is forced to rely on as little as a single free day's worth of car supply, or even two days' worth as BNSF allocates under its Storage Book for tank cars that receive a BNSF line haul. ADM cannot possibly size its private car fleet to operate with the precision necessary to meet BNSF's singularly restrictive requirements for holding empty private cars prior to loading.

27. ADM believes that it is as much entitled now to use BNSF trackage for empty private cars prior to loading as before BNSF instituted its new policies in July 2001. We also recognize that, regardless of what ADM as a private car shipper may be entitled to legally in the way of holding track use, it is unwise and of no long-term benefit to either a shipper or its serving railroad to abuse those rights by consistently keeping empty private cars on railroad track for 30 days or more, as BNSF complained that some of its customers were doing in testimony filed by BNSF's Douglas Langston in 2003. But it is a big leap between objecting to private car storage on BNSF track for 30 days and imposing restrictions which limit private car use of BNSF track to as little as one or two days. Some people would call that throwing the baby out with the bath water.

28. So far as ADM is concerned, the use of railroad trackage to hold empty private cars prior to placement for loading is as much BNSF's responsibility when it receives freight revenue through the use of private cars as when it receives freight revenue through the use of railroad cars. ADM is not required to pay demurrage or similar charges to BNSF on empty railroad equipment retained by BNSF before placement at an ADM facility to load, for example, soybean meal unless and until ADM actually requests the car for a specific want date as required by BNSF's rules. Only if ADM refuses to accept the car if it is tendered on the want date is BNSF entitled to place that car on constructive placement and assess demurrage against ADM until the car is accepted, loaded, and released. ADM, however, has no opportunity to request that its private cars be placed for loading on specific want dates. Moreover, as our experience at Havelock shows, BNSF's service, especially in the movement of empty cars to loading points is so erratic that it is clear why BNSF is not willing to allow shippers to specify want dates for the placement of private equipment. Before the July 2001 changes of BNSF went into effect, shippers were not penalized for the inconsistencies in BNSF transit times when moving private cars. Today, we are.

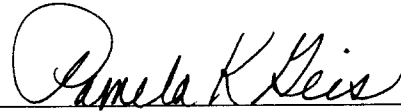
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VERIFICATION

Randy Neumayer, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.

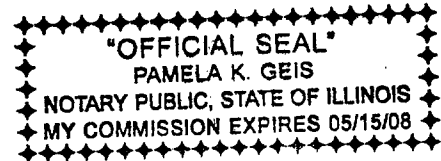


Subscribed and sworn to before me this 13<sup>th</sup> day of July, 2005.



Notary Public

My commission expires 5-15-2008.





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## Carload Transit Schedules

BNSF Origin: HAVELOCK, NE Release  
BNSF Destination: REDLANDS, CA Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	7 : 00	168
Tuesday	7 : 00	168
Wednesday	7 : 00	168
Thursday	8 : 00	192
Friday	7 : 00	168
Saturday	7 : 00	168
Sunday	7 : 13	181

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## Carload Transit Schedules

BNSF Origin: REDLANDS, CA Release  
BNSF Destination: HAVELOCK, NE Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	8 : 05	197
Tuesday	8 : 05	197
Wednesday	12 : 05	293
Thursday	11 : 05	269
Friday	10 : 05	245
Saturday	9 : 05	221
Sunday	9 : 05	221

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## **APPENDIX B**

**REDACTED**



**EXHIBIT NO. 3**

**VERIFIED STATEMENT  
OF  
TERRY J. VOSS  
ON BEHALF OF  
AG PROCESSING INC**

1. My name is Terry J. Voss. I am Senior Vice President, Ag Processing Inc ("AGP"). I am primarily responsible for the formulation and implementation of transportation policy and planning for AGP.

2. AGP is a cooperative, itself owned by local farmer cooperatives, and primarily is in the business of processing soybeans, merchandising grain and grain products domestically and for export, and manufacturing ethanol and its co-products made from corn. To further these activities, AGP maintains a private car fleet which, in 2004, consisted of covered hoppers and tank cars, for a total of cars. The covered hopper car component of AGP's fleet has actually declined in size by about 400 cars since 2000, in part due to the advent of larger capacity cars, and in part due to the fact that BNSF Railway ("BNSF") and other western carriers upon whose service AGP relies for grain originations have made greater use of grain shuttle trains in equipment supplied by the carriers. AGP nevertheless continues to require private covered hopper cars because BNSF and other carriers decline to furnish such cars for certain grain processing byproducts, such as dried distillers grain, or are chronically short of equipment to meet foreseeable needs involving the transportation of grain products such as soybean meal. Tank cars, of course, are not supplied at all by the carriers, including BNSF, and AGP relies exclusively on private tank cars to move its soybean oil, methyl ester, and ethanol shipments. AGP's tank car fleet has increased from cars in 2000 to cars in 2004,

despite improvements in individual car capacity, in order to respond to growing business needs and to overcome periodically, if not chronic, inconsistent carrier service, a characterization from which I cannot exclude BNSF.

3. AGP originates shipments at 37 locations in the United States, including 22 served directly or through switching arrangements by BNSF. AGP also originates shipments on Union Pacific, Canadian Pacific, Canadian National, Norfolk Southern, and several regional or short line railroads. BNSF is the only railroad from which AGP has ever accrued holding charges on empty private cars while on carrier tracks prior to placement for loading.

4. Many of AGP's private cars are operated under leases from car suppliers. For the most part, over the years, these leases have been and remain multi-year commitments, ranging up to 18 years' duration. The covered hopper car component of our fleet to a great extent handles outbound products such as soybean meal and dried distillers grain. The tank car fleet is used to transport both crude and refined soybean oil, methyl ester, and ethanol. AGP's private car fleet originated        loads in 2004.

5. Several considerations come into play when AGP attempts to determine whether its private car fleet should be expanded or contracted. As indicated, we have been able to reduce our covered hopper car fleet because feed grain shipments are more frequently moving in carrier equipment than previously. However, carrier cars continue to be in short supply for soybean meal shipments and non-existent for bulk liquid commodities. When AGP considers changes in its private car fleet, it attempts to project market demand for the commodities it ships in private cars, the availability of carrier equipment, the extent to which cars will be retained for unloading by consignees, and,

most importantly, railroad transit times for both loaded and empty cars. Insofar as rail service is concerned, transit times, including those on BNSF, are equally unpredictable for both covered hopper cars and tank cars.

6. In early April 2005, I utilized a customer tool available on the BNSF website that provides estimated transit times between points served by BNSF. At that time, I printed the BNSF transit schedule from Dawson, MN, where AGP produces crude soybean oil, to Hastings, NE, where AGP refines crude soybean oil into refined oil. Appendix A hereto is the result of that inquiry. Appendix A-1 shows that BNSF-estimated transit times from Dawson to Hastings varied from 4 days 16 hours to 7 days 16 hours and were the same on only 2 days of the week, Monday and Thursday. Appendix A-2 is the disclaimer that BNSF maintains in its website with respect to transit schedules, noting that no transit schedule should be "relied upon to establish a course of dealing" by BNSF. Appendices A-1 and A-2 to this statement were submitted by AGP to BNSF as part of our discovery responses.

7. To prepare further for this verified statement, I caused the BNSF website to be reviewed again for the Dawson to Hastings transit schedules and for other transit schedules as well. Appendix B-1 is the BNSF schedule from Dawson to Hastings found on the BNSF website on July 4, 2005, and Appendix B-2 is the reverse schedule from Hastings to Dawson. AGP ships loaded tank cars from Dawson to Hastings and returns empty tank cars from Hastings to Dawson. The current schedules show that BNSF has shortened its transit times from Dawson to Hastings and made them slightly more consistent. On 2 days of the week the schedule is 4 days 16 hours; on 3 days of the week it is 4 days 19 hours; on 1 day it is 5 days 19 hours, and on the 7th day it is 6 days 19 hours.

The spread between the shortest and longest transit times has been reduced from 3 days to 2 days. However, the reverse trip, which is used for our empty tank cars, remains highly erratic. The shortest transit times, available on two days, are 4 days 12 hours. On two other days, the trip takes 5 days 12 hours; on yet two more days the trip takes 6 days 12 hours; and on the 7th day it takes 7 days 12 hours. AGP's actual experience in 2004 showed that BNSF transit time on loads from Dawson to Hastings was from 2 to 14 days, while empties in the reverse direction took from 3 to 8 days.

8. We also reviewed the transit times between Manning, IA and Hastings. Manning is another point at which AGP produces crude soybean oil shipped in private tank cars to Hastings, from which empty cars are returned to Manning. Appendix C-1 shows the estimated BNSF transit times from Manning to Hastings. The quickest trip, on a Tuesday, is 3 days 16 hours, while the longest trip, on a Friday or Sunday, is 5 days 16 hours, with varying other times on the remaining days. The return trip takes 5 days 8 hours, 6 days 8 hours, or 7 days 8 hours, depending on the day of the week. AGP's records for 2004 show that loads from Manning to Hastings took anywhere from 2 to 8 days and empties moving over the reverse route took between 3 and 11 days.

9. It is largely because of the difficulty in predicting the transit times for loaded and empty cars on railroads, including BNSF, that AGP believes that it cannot operate a private car fleet that is reduced to a bare-bones minimum. Inconsistent transit times cause fleet planning problems whether the inconsistency results in faster or slower service than the "norm." Faster service results in a need for more holding track; slower service requires more cars which in turn also means more holding track is necessary. If



BNSF and other carriers provided more consistent service, AGP could with greater confidence attempt to limit the size of its private car fleet.

10. In early February 2001, BNSF announced a system-wide termination of allowing its tracks to be used to hold empty private cars prior to loading as part of the freight rate, except for a limited number of free days which varied according to when each private car arrived at its loading point and whether the car was a tank car or a covered hopper car. Tank cars received one to two days' free time; covered hoppers as little as two days. Covered hopper cars of the type operated by AGP, for use in moving grain products, were to be subjected to demurrage rates which varied seasonally, and were scheduled to become \$75.00 per car per day as of August 1, 2001. Today, the demurrage rate for that type of car is \$50.00 per chargeable day. Tank cars faced a rate of \$25.00 per chargeable day, which since has been reduced to \$25.00, \$15.00, or \$10.00, depending on geographic location. At Manning, IA, where AGP uses both private covered hopper cars and tank cars, the covered hopper car rate is \$50.00 per day and the tank car rate is \$10.00 per day. At Hastings, NE, and Dawson, MN, the covered hopper car rate is \$50.00 per day and the tank car rate is \$15.00 per day.

11. It was clear to AGP that at least three of its facilities were likely to incur BNSF empty car charges under the BNSF policies adopted on July 1, 2001. Those facilities were at Hastings, NE, where separate plants produce ethanol and crush soybeans; Manning, IA, which is a soybean crushing facility; and Dawson, MN, also a soybean facility. At Hastings, AGP had approximately 24,500 feet of industrial track serving both the ethanol and soybean plants. At Dawson, there were 8,100 feet; at Manning, 5,700

feet. As can be seen, AGP had made substantial investments in industrial track even before BNSF announced its July 1 policy changes.

12. At AGP's Hastings soybean processing facility, AGP owned unused land that had been acquired for future plant expansion, which is presently under way, including 14,000 feet of new private track. However, at the Hastings ethanol facility and at the Dawson and Manning facilities no additional land was available to AGP for the construction of private track. AGP began to incur BNSF empty car holding charges at those points. Our company incurred demurrage and storage bills to BNSF in the amount of \$\_\_\_\_\_ at Hastings and \$\_\_\_\_\_ at Manning. In an effort to curtail these charges and to prevent a recurrence of them, AGP entered into track lease agreements with BNSF. At Hastings, AGP entered into an agreement in August 2001 to lease \_\_\_\_\_ track feet on a "floating" basis to hold up to \_\_\_\_\_ loaded or empty cars. The rental was \$ \_\_\_\_\_ per track foot per year and the lease was for a term of one year, but can be terminated by BNSF at any time for any reason on 30 days' notice. Prior to the institution of BNSF's empty car holding charges in July 2001, AGP had found it unnecessary to lease any BNSF track at Hastings. In 2003, the Hastings lease was amended up to \_\_\_\_\_ feet to hold a maximum of \_\_\_\_\_ cars.

13. At Manning, where AGP is captive to BNSF, AGP entered into a lease with BNSF for the floating track equivalent of \_\_\_\_\_ cars at a rate of \$ \_\_\_\_\_ per track foot per year. BNSF allowed AGP a credit against the first year's track rental in an amount equal to private car holding charges incurred from August 26, 2001, the date on which the lease was signed, through December 31, 2001. This lease also is subject to cancellation on 30 days' notice. Because BNSF could not lease sufficient track to AGP at Man-

ning to handle all of AGP's empty private cars, AGP entered into a supplemental floating lease of track with BNSF near Council Bluffs, IA at a rate of \$     per track foot per year. Ultimately, AGP invested over \$     at Manning, where AGP is captive to BNSF, to construct additional track and BNSF agreed to waive AGP's 2001 empty car holding charges for Manning of \$     plus \$     in additional credits. AGP incurred a net expense at Manning of over \$     to construct additional private track as a result of BNSF's holding charges.

14.     At Dawson, where AGP also is captive to BNSF, AGP was unable to construct additional industrial track or to lease track from BNSF. Our plant is completely surrounded by the town of Dawson, which precludes plant growth. The company's operations at Dawson accordingly have been restricted to shipping volume levels that would have been higher but for the BNSF charges on empty private cars.

15.     If BNSF had simply approached AGP prior to February 2001 to discuss expansion, where possible, of AGP's private trackage for holding private cars in return for adequate compensation by BNSF, AGP most assuredly would have engaged in those discussions with BNSF. As it was, BNSF chose to impose its charges first, which gave it leverage over AGP in the form of being able to demand track leases on terms set by BNSF. AGP does not believe it should have been compelled to lease track from BNSF to avoid its empty car charges.

16.     AGP's view that BNSF intended its July 1 charges to provide BNSF with leverage to obtain concessions and increased revenue from BNSF's customers is supported by two separate experiences with BNSF. First, when AGP was negotiating compensation with BNSF in return for the construction of additional AGP private trackage

subsequent to July 1, 2001, BNSF suggested that, if AGP would reduce its overall tank car fleet by    percent, BNSF would reduce its minimum volume requirements for AGP by approximately    percent. AGP would still have to meet whatever applicable or increased rate BNSF charged and minimum volume requirements, as well, but with a fleet of tank cars    percent smaller. Plainly, the proposal posed substantial increases in business risks to AGP and it was deemed unacceptable. By proposing a decrease in the overall size of AGP's tank car fleet, a fleet that was used not just on BNSF, in return for a non-commensurate reduction in BNSF minimum volumes, BNSF in effect was attempting to require AGP to remove tank cars from routings via carriers other than BNSF. AGP could not agree to that proposal.

17.     Additionally, in March and April of 2001, I attended BNSF forums in Fort Worth, TX held for the purpose of explaining the empty private car charges that were to take effect that summer. Representatives of some processing companies who belong to North America Freight Car Association ("NAFCA"), and others, were present. I remember distinctly that BNSF representatives stated at those meetings that an alternative to the empty car holding charges would be for shippers to enter into premium rate volume guarantee contracts with BNSF that entailed performance standards by BNSF within defined corridors. Under this approach, BNSF would pay a penalty if it failed to perform and shippers would guarantee minimum shipment volumes and penalties if they failed to meet those volumes. However, BNSF has never been willing to pay penalties for non-performance except in modest per-car amounts, which are totally insufficient to compensate a shipper for service inadequacies that cause plant slow-downs, shut downs, and production difficulties that result in customer contract breaches, and BNSF indicated no de-

sire on its part to depart from that practice. AGP viewed these contract suggestions by BNSF as an attempt to use the empty car charges to leverage additional business from AGP without adequate protection in return.

18. In the approximately four years since the July 1 charges were instituted, AGP has experienced no offsetting reduction in BNSF rates in return for the full cost of constructing and maintaining additional private track or the cost of leasing BNSF floating track, other than the limited capital contributions from BNSF accorded in relation to 2001 empty car charges. As indicated, those contributions by BNSF were nowhere near sufficient to pay for the cost of the private track and do not compensate AGP for continuing track maintenance costs.

19. Our private track investments may be of benefit to AGP, but clearly also benefit BNSF and a broad segment of its customer base by relieving BNSF of its own capital investments to construct similar quantities of track. Indeed, not only has AGP failed to experience any reduction in shipping costs or other full compensation for its investments, but AGP actually has experienced sharp increases in BNSF freight rates over the past two years.

VERIFICATION

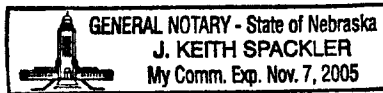
Terry J. Voss, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.

Terry J. Voss

Subscribed and sworn to before me this 11 day of JULY, 2005.

J. Keith Spackler  
Notary Public

My commission expires NOVEMBER 7, 2005



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## Carload Transit Schedules

**BNSF Origin:** DAWSON, MN      **Release**  
**BNSF Destination:** HASTINGS, NE      **Placement**  
**Release/Interchange Time:** 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Monday	4 : 16	112
Tuesday	6 : 02	146
Wednesday	5 : 02	122
Thursday	4 : 16	112
Friday	7 : 16	184
Saturday	6 : 16	160
Sunday	5 : 16	136

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## Carload Transit Schedules

Customer understands and agrees that the shipment information, transit times, trip plans and other service performance data (collectively "BNSF Shipment Information") provided herein are for informational and comparative purposes only.

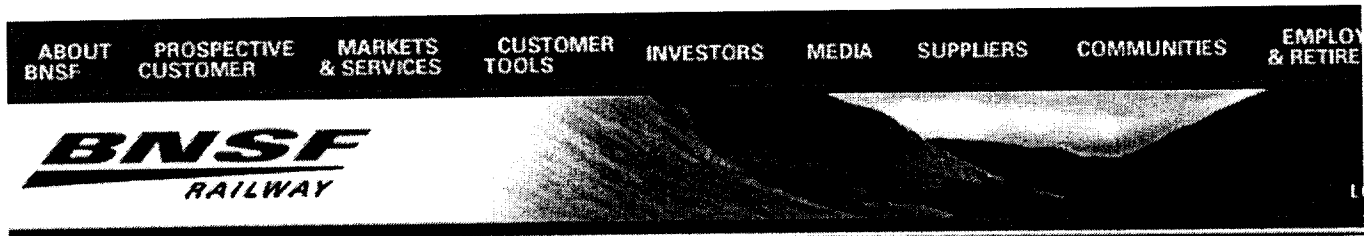
The BNSF Shipment Information provided herein excludes

- 1) Intermodal and unit train shipments
- 2) hazardous materials shipments that are subject to special handling or routing,
- 3) dimensional shipments (high, wide or oversize) and
- 4) shipments involving offline movements or shortline movements.

The accuracy of BNSF Shipment Information may be affected by a variety of factors including weather, accidents, derailments, labor disruptions and other circumstances. BNSF Shipment Information is not intended and should not be construed to create any binding representation or contractual undertaking, nor should it be relied upon to establish a course of dealing or express or implied warranty of any kind. BNSF's commitments are contained in the applicable tariff or contract and those obligations are not modified or amended by the publication of the BNSF Shipment Information. Customer understands and agrees that the BNSF Shipment Information is an estimate of future performance and is not intended as a performance guarantee.

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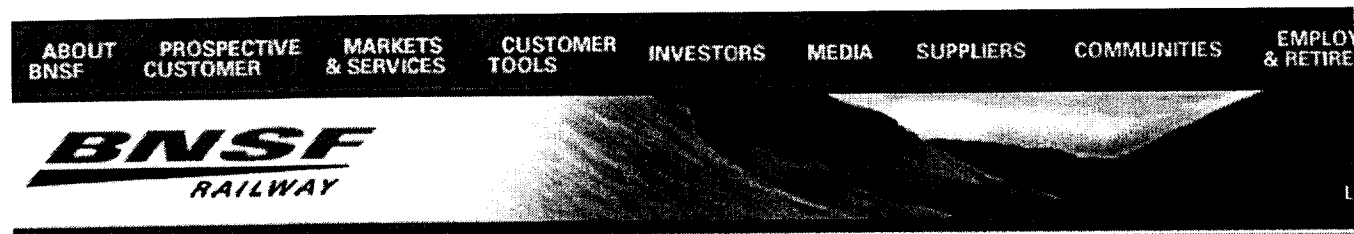
## Carload Transit Schedules

BNSF Origin:      DAWSON, MN      Release  
BNSF Destination: HASTINGS, NE      Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	4 : 16	112
Tuesday	4 : 19	115
Wednesday	4 : 19	115
Thursday	4 : 16	112
Friday	6 : 19	163
Saturday	5 : 19	139
Sunday	4 : 19	115

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## Carload Transit Schedules

BNSF Origin: HASTINGS, NE Release  
BNSF Destination: DAWSON, MN Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	7 : 12	180
Tuesday	6 : 12	156
Wednesday	6 : 12	156
Thursday	5 : 12	132
Friday	4 : 12	108
Saturday	5 : 12	132
Sunday	4 : 12	108

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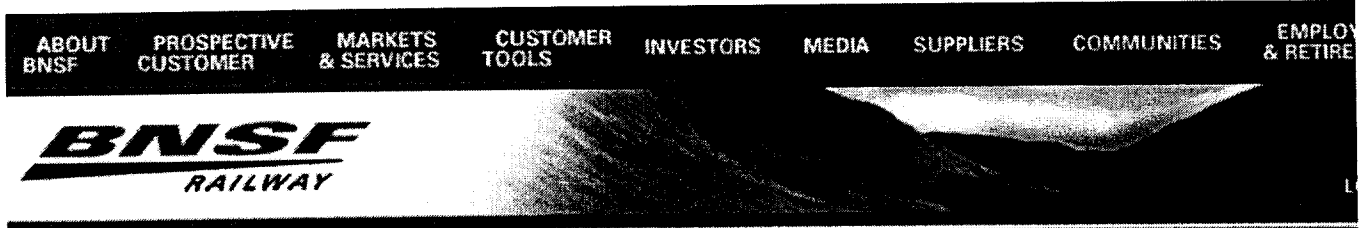
## Carload Transit Schedules

BNSF Origin: MANNING, IA Release  
BNSF Destination: HASTINGS, NE Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	4 : 16	112
Tuesday	3 : 16	88
Wednesday	4 : 19	115
Thursday	3 : 19	91
Friday	5 : 16	136
Saturday	4 : 16	112
Sunday	5 : 16	136

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## Carload Transit Schedules

BNSF Origin: HASTINGS, NE Release  
BNSF Destination: MANNING, IA Placement  
Release/Interchange Time: 17:00

Release/Interchange	Estimated Transit Days : Hrs	Estimated Equivalent Hours
Day of Week		
Monday	7 : 08	176
Tuesday	6 : 08	152
Wednesday	7 : 08	176
Thursday	6 : 08	152
Friday	5 : 08	128
Saturday	6 : 08	152
Sunday	5 : 08	128

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**PUBLIC VERSION**

**EXHIBIT NO. 4**

VERIFIED STATEMENT  
OF  
DARRELL R. WALLACE  
ON BEHALF OF BUNGE NORTH AMERICA, INC.

1. My name is Darrell R. Wallace. I am Vice President – Transportation for Bunge North America, Inc. ("Bunge"). Bunge is a merchandiser of grain, both domestically and for export, and a processor of corn and soybeans. It operates 32 facilities in the United States that are served by rail, as shown on the following table.

Table 1

Bunge U.S. Facilities Served by Rail

<u>Facility Location</u>		<u>Serving Carrier</u>	<u>Carriers Serving through Switching</u>
Decatur	AL	CSXT	NS
Modesto	CA	MET	
Island Park	IA	BNSF	UP, CN
McGregor	IA	ICE	
Council Bluffs	IA	UP	BNSF, KCS, CN, IAIS
Bradley	IL	CN	
Cairo	IL	CN	
Danville	IL	NS/CSXT	UP
East Clinton	IL	UP	
Decatur	IN	CFE	
Indianapolis	IN	CSXT	NS
Morristown	IN	CSXT	
Waterloo	IN	NS	
Atchison	KS	UP	BNSF
Emporia	KS	BNSF	
Destrehan	LA	CN	

PUBLIC VERSION

Tallulah	LA	KCS	
Savage	MN	TCW	UP, CPRS
Marks	MS	CN	
Vicksburg	MS	KCS	
Crete	NE	BNSF	UP
Stella	NE	UP	
Bellevue	OH	NS	
Cincinnati	OH	NS	CSXT
Delphos	OH	CFE	
Jeffersonville	OH	IORY	NS
Marion	OH	CSXT	NS
Melvin	OH	CSXT	
Sabina	OH	IORY	
Winchester	OH	NS	
Chattanooga	TN	NS/CSXT	
Memphis	TN	CN	BNSF, NS, CSXT, UP
Ft. Worth	TX	FWWR	UP, BNSF

As Table 1 indicates, Bunge's facilities are served directly or via reciprocal switching by all Class I railroads operating in the U.S. Four of its facilities are directly served by BNSF: one at Island Park, IA, one at Council Bluffs, IA; one at Emporia, KS; and one at Crete, NE. The facility at Island Park is a major soybean crushing facility, opened in 1999. The facilities at Island Park, Emporia and Crete are also processing facilities; soybeans at Island Park and Emporia and corn at Crete. The facility at Council Bluffs loads bulk grain exclusively. In all, Bunge operates 16 facilities in the U.S. that crush or process corn or soybeans at locations shown in Table 1.

2. Bunge operates a large fleet of private cars to service its corn and soybean processing facilities. As of March 2005, Bunge operated covered hopper cars, including owned by Bunge. . As of the same date, Bunge operated tank cars,

including tank cars owned by Bunge, and leased boxcars. Its total fleet came to cars. The tank cars are used to move crude soybean oil to refineries operated by Bunge and other soybean processors, as well as refined soybean oil primarily to customers in the food processing industry, where the refined oil is employed in such processes as the preparation of frozen foods, cooking oils, salad dressings, and a wide variety of other applications. Covered hopper cars are used to transport soybean meal, the major byproduct of soybean crushing, which is primarily consumed by the animal and poultry feed industry. Bunge's covered hopper cars are sometimes required to assure a supply of soybeans coming into Bunge's crushing facilities. Other byproducts of the crushing process, such as soybean hulls, also utilize covered hopper cars. The boxcars are used for the transportation of bagged corn products.

3. Bunge operates its private fleet to insure that its corn and soybean processing plants can continue to operate. A corn or soybean processing plant is an extremely complex and costly facility to both construct and operate. Corn and soybeans, which the crushing facilities obtain in part from local farms, and in part by rail from more distant sources of supply, must be available to keep the plants running. When the plant is operating, there must be a means available to move products. Soybean meal is largely fungible and can be stored, but it loses some of its value as a source of protein if stored too long and normally is in demand by the feed industry, which prefers to purchase soybean meal on an "as needed" basis, thereby requiring a manufacturer such as Bunge to make constant shipments in relatively small quantities. There are, however, export movements of soybean meal which move in trains of 100 cars, usually in private equipment. Crude soybean oil is also to some extent fungible, but the preferable method of merchandising

crude oil is to ship it as quickly as possible in order to maintain cash flow. Refined soybean oil generally is not fungible, as it is normally blended to meet a buyer's specific specifications. As each quantity of refined oil is blended, it must be loaded into a tank car. Private specialty equipment, notably pressure differential and air slide cars, are used to ship food grade bulk corn products.

4. If any part of the soybean or corn processing chain does not function, the consequence is a shut-down of the processing plant, an occurrence which Bunge does everything in its power to avoid. The immediate costs of shutting down, even for a day, and restarting a corn or soybean processing facility run between \$100,000 and \$150,000. These costs do not even begin to reflect the total impact of a plant shut-down, which also must be measured in terms of lost sales opportunities and sales contract breaches; idle equipment costs; idle labor costs; and injury to Bunge's reputation as a reliable product supplier.

5. Neither truck nor barge is a realistic alternative to BNSF rail service necessary to enable those processing facilities served by BNSF to ship product. Most of Bunge's corn and soybean processing facilities are located in rural areas of high corn and soybean production. Major markets for soybean oil, soybean meal, and corn products however, often are more densely populated areas such as the west coast or east coast, to which neither barge nor truck transportation is economically feasible. The movement of large quantities of soybean oil by truck is highly problematic from Bunge's BNSF served facilities, partially because of a scarcity of appropriate tank trucks and partially because of cost considerations. Over 85 percent of the products produced at Bunge's BNSF served corn and soybean processing facilities are shipped by rail.



6. Railroads, however, including BNSF in particular, do not maintain a supply of rail cars adequate to insure that Bunge's processing facilities can continue to function without interruption and continue to meet commitments to customers. No railroad supplies tank cars. There is a limited supply of larger covered hopper cars, in excess of 5,000 cubic feet, of the type preferable for the movement of soybean meal because transportation costs in the larger cars are lower per ton than in the older, 4,750 cubic foot cars. Although some railroads, and BNSF in particular, have acquired newer, larger covered hopper cars in recent years, those cars find themselves principally in shuttle grain service, and not normally available to meet full demand for grain product transportation. BNSF, like most other railroads, does not have an adequate supply of specialty covered hoppers.

7. Private covered hopper cars indisputably are essential to either supplement the railroad fleet or, in many cases, to act in lieu of railroad cars that are simply unavailable. This is in part due to a difference between the goal of a railroad in furnishing cars and the goal of a shipper in operating them. BNSF has made it plain, as have other railroads, that their allocation of capital resources to the types of freight cars required by Bunge is not unlimited. BNSF's Douglas Langston in fact stated earlier in this proceeding that BNSF, were it to supply tank cars, would do so only in quantities necessary to meet "average demand." Bunge, on the other hand, does not make corn and soybean products to meet "average" demand, but to meet actual market conditions, so that it is inevitable that Bunge will need more cars than a railroad such as BNSF is able to supply, even when it chooses to supply any of the necessary types.

8. That does not mean, however, that Bunge ever did or ever would simply acquire, by lease or purchase, private rail cars without quantitative discipline. The cost of

acquiring and maintaining rail cars is far too high to allow them to be accumulated irresponsibly. A new 25,000 gallon tank car costs \$95,000 to purchase, plus monthly maintenance costs. The rental for such a car is in excess of \$675 per month, subject to a multi-year lease term in today's market. Covered hopper cars in excess of 5,000 cubic feet sell for approximately \$66,000, plus monthly maintenance, or are available for lease at costs in excess of \$635 per month, also subject to leases of approximately 5 years' duration. These costs do not allow the frivolous, unproductive accumulation of private cars.

9. When Bunge determines whether or not to acquire additional tank cars, it undertakes a cycle time analysis based on forecasted rail volumes and average round trip days between the origin to which the tank car normally will be assigned and the markets served by that origin. However, predicting the appropriate size of a private car fleet is not an exact science. Private fleet sizing is made difficult primarily because of the ever-present vagaries of rail transit times. The experience of Bunge personnel is that rail transit times on all railroads, including BNSF, vary widely. BNSF's website, which will display estimated scheduled transit times between any two points, reflects multiple day transit variances depending on the day of the week the shipment originates. And scheduled times also will vary with weather conditions, traffic conditions, power availability, track repair or construction, crew availability, and railroad decisions regarding the allocation of personnel. Customers may hold cars at destination points, but they claim to Bunge that unloading cars promptly is made difficult by unpredictable BNSF rail service. BNSF on-time performance has been between 80 and 90 percent over recent years, which is merely an average. During any given week, some facilities may experience 100% on-time performance at some times, while others receive only 60% at other times. Bunge has heard

BNSF representatives state that BNSF places a higher priority on meeting intermodal scheduled delivery commitments than on allocating resources to the movement of agricultural products, including soybean oil tank cars and many soybean meal shipments in smaller quantities, which generally are handled in merchandise trains. Indications such as those and the expensive consequences of undesirable service have placed Bunge on notice that, in sizing its private fleet, Bunge must be as accurate as possible in light of inconsistent rail service.

10. Most of Bunge's private fleet has been acquired, and is used, to service older processing facilities. The notable exception is the Island Park Facility constructed in 1999 on land acquired at about that time. Having in mind opportunities to expand production, Bunge acquired more land than needed to support the crushing and refining equipment initially installed at the facility. In 2001, when BNSF announced its new policy of imposing demurrage or storage charges on empty private cars prior to loading, Bunge already had under way plans to add additional track. Bunge was thus able to avoid BNSF's storage charges.

11. At its Emporia and Crete facilities, however, Bunge was not so fortunate. These were older facilities, designed and constructed at a time when the serving carrier held empty private cars awaiting loading on carrier track, without charge and without limitation. Neither of those facilities had excess land on which additional private track could be constructed to hold empty cars prior to loading. The BNSF demurrage and storage charges accordingly faced Bunge with the prospect of substantial new charges for maintaining the private fleet necessary to keep those facilities operating. At the time BNSF announced its new program, each tank car faced a daily charge of \$25.00 after ap-

plicable free time or credits were applied, and each covered hopper car faced a daily charge of \$25.00 on July 1, with an increase to \$75.00 scheduled for August 1, 2001, likewise after the application of credits. Those charges subsequently were reduced; the daily demurrage charge for covered hopper cars handling grain and grain products now is \$50.00, and the charge on tank cars at Crete is now \$15.00. The tank car charge remains \$25.00 at Emporia. Bunge incurred some \$            in empty BNSF private car demurrage and storage charges at Crete in a little more than a year after the charges were instituted.

12. To avoid payment of these and other potential charges, Bunge entered into track lease agreements with BNSF at both Emporia and Crete. At Crete, Bunge leased "floating" track space for "not more than    empty rail cars ... used solely for grain and grain products and corn and corn products." At Emporia, Bunge leased "floating" track space from BNSF for "not more than    empty rail cars ... used solely for grain and grain products, soybeans and soybean products." In a separate agreement, Bunge leased track from BNSF for    loaded cars at Crete.

13. The lease rate for the empty car agreement at Crete was \$    per track foot per year, while at Emporia the lease rate is \$    per track foot per year. Each empty car track lease can be terminated by BNSF upon 30 days' notice. Each of the empty car track leases requires Bunge to indemnify BNSF for any damage caused by the "occupation and use of railroad's property or the track pursuant to this agreement," thereby imposing obligations on Bunge that did not attach when BNSF held Bunge's empty private cars prior to loading before BNSF's demurrage and storage charge regime was instituted in July 2001.

14. A "floating" lease is one under which to Bunge is not assigned a fixed segment of BNSF yard track, and BNSF simply allocates track space for the specified maximum number of cars wherever on its property BNSF chooses to do so. If Bunge does not keep the maximum, specified number of empty cars on BNSF pursuant to the "floating" lease, rental must be paid anyway. If Bunge does utilize the "floating" lease, our experience has been that our empty cars occupy the same BNSF yard track and facilities in general as they did prior to July 1, 2001.

15. Administratively, BNSF's dual regime of demurrage and storage charges presents a puzzle. Bunge's facilities at Island Park, Emporia and Crete each utilize private covered hopper cars and tank cars for loading. The covered hopper cars are subject to a so-called average agreement that allows up to two credits and thereafter imposes a \$50.00 per car per day charge. If the same amount of track space in the same BNSF yard is occupied by a tank car, however, storage charges are calculated under a "straight" plan. Under that plan, cars normally receive one or two days free time, depending on outbound routing, but then incur a \$10.00 charge at Island Park, a \$15.00 charge at Crete and a \$25.00 charge at Emporia. The reason given by BNSF for establishing different levels of storage charges that apply to all cars other than covered hopper cars handling grain and grain products supposedly was to reflect differing levels of congestion on its system. A \$25.00 storage charge was to apply in the most congested areas, a \$10.00 charge in the least congested areas, and a \$15.00 charge in moderately congested areas. Thus, BNSF considers Island Park to be a low congestion, \$10 per day, point, and Crete to be a moderately congested, \$15 point where tank cars are concerned, but a \$50.00 per day area where covered hopper cars are concerned. At Emporia, an empty covered hopper car oc-

cupying space in the BNSF yard is subject to a \$50.00 charge, while an empty tank car right next to it incurs a \$25.00 charge.

16. In none of these cases is BNSF recovering compensation for equipment that it owns or furnishes. Its charges appear to be solely for the use of its track. If BNSF's track at Island Park is worth only \$10 a day per car and at Crete is worth only \$15.00 per car per day when occupied by an empty tank car, I can see no reason why it is worth \$50.00 per car per day when occupied by an empty covered hopper car. Similarly, if BNSF's track at Emporia is worth \$25.00 per car per day when occupied by a tank car, I can see no reason why the same track is worth \$50.00 per car per day when occupied by a covered hopper car. It goes without saying that Bunge is not proposing that BNSF maintain uniform rates of \$50.00 per day on all equipment; Bunge obviously opposes any such charges. We simply say that BNSF's system of charges makes no sense.

17. As indicated above, Bunge's facilities are served by every Class I railroad. However, at no Bunge facility that loads private cars on any railroad other than BNSF has Bunge incurred empty private car storage or holding charges. The empty private car storage provisions adopted by Union Pacific Railroad do not apply to any equipment, whether covered hopper car or tank car, engaged in the transportation of grain or grain products. Although Canadian National also has tariff provisions applicable to empty private cars prior to loading, its approach is to negotiate car storage agreements where, in CN's judgment, such agreements are appropriate, and it is Bunge's understanding that such agreements provide for the holding of a certain number of empty private cars without charge. Only if such an agreement is in place and is violated is there a CN charge. Bunge has never been requested to enter into a car storage agreement with CN and has

incurred no charges for empty private cars held on CN track prior to loading. CSX, which also instituted empty private car holding charges early this year, allows 20 day's free time, and those provisions have had no adverse impact on Bunge. Norfolk Southern, the last of the major Class I railroads serving Bunge's facilities, has no program of holding charges for empty private cars. Prior to BNSF's institution of empty private car holding charges, BNSF did not ask Bunge to construct or provide additional industrial holding track for empty private cars. The charges imposed by BNSF in July 2001 served to give BNSF an advantage which it used to "incentivise" Bunge to enter into track leases that removed no private cars from BNSF trackage and merely bestowed additional revenue on BNSF.

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VERIFICATION

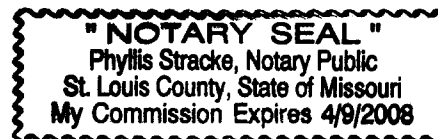
Darrell R. Wallace, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.

Darrell R. Wallace

Subscribed and sworn to before me this 16th day of June, 2005.

Phyllis Stracke  
Notary Public

My commission expires 4/9/2008.







**EXHIBIT NO. 5**

**VERIFIED STATEMENT  
OF  
FRANK SIMS  
ON BEHALF OF  
CARGILL, INCORPORATED**

1. My name is Frank Sims. I am Corporate Vice President, Transportation and Logistics, for Cargill, Incorporated ("Cargill"). In that capacity, I have advisory, policy, and administrative responsibility for the transportation services required by Cargill and its U.S. based subsidiaries and affiliates. Within the Cargill corporate structure there are various discrete business units that are operating divisions of Cargill, as well as separate legal subsidiaries. The latter category includes Cargill Meat Solutions ("CMS"), formerly known as Excel Corporation. Unless otherwise indicated, when I refer herein to "Cargill" I am referring to Cargill, Incorporated, including its business units and subsidiaries.

2. Cargill engages in a number of business activities that require the use of rail transportation, including transportation provided by BNSF Railway ("BNSF"). These activities include the purchase and sale of feed grains, soybeans and oil seeds; soybean processing; corn processing, including ethanol production; malt production; animal and poultry feed supply; the distribution of deicing, food grade and industrial salts; and the cultivation, slaughtering, packing, and distribution of beef, pork, and poultry, including byproducts resulting from those activities.

3. As of May 1, 2005, Cargill was the lessee of freight cars and the owner of cars. Cargill's fleet included boxcars (used for the transportation of bagged products) and gondola cars (formerly used for the transportation of steel

products). The main part of Cargill's private car fleet included tank cars and covered hopper cars of various types, including gravity unload cars, pressure differential cars and air slide cars. The latter two categories of covered hopper cars are primarily for the transportation of corn products. Gravity-unload covered hopper cars are used for the transportation of grain and certain grain products such as soybean meal, soybean hulls and corn-based meal products and other agricultural products. A segment of the Cargill gravity-unload covered hopper car fleet is engaged in the transportation of industrial and rock salt and of dried mammalian byproducts. Tank cars handle liquid products such as grain and seed oils, corn sweeteners and ethanol, and semi-liquid products such as tallow.

4. Cargill originates private equipment on every Class I railroad operating in the United States and several regional or short line railroads. Fifty-three facilities owned by Cargill or Cargill joint ventures are served solely by BNSF or jointly by BNSF and another railroad through a switching arrangement. Neither BNSF nor any other railroad serving a Cargill facility supplies tank cars, and Cargill has always had to rely on its own supply of that type of equipment. Without an adequate supply of tank cars, Cargill's facilities that produce bulk liquid commodities could not economically function because the production output of these facilities cannot be marketed in sole reliance on truck transportation.

5. BNSF likewise does not maintain a large supply of pressure differential and air slide covered hopper cars used in the transportation of corn products. Cargill's corn milling operations could not be maintained without privately-supplied pressure differential and air slide cars. BNSF and other railroads discourage the use of their equip-

ment for the transportation of salt because of its corrosive propensities. As a result, almost all of Cargill's salt transportation takes place in private covered hopper cars.

6. BNSF, like other railroads, does supply some general purpose, or grain-type, covered hopper cars for the movement of corn, soybeans, wheat, sorghum, oil seeds, and certain grain products such as soybean meal or soybean hulls. Increasingly, however, BNSF has been concentrating its own fleet of grain covered hopper cars in its shuttle train program, under which trains of 100 to 110 cars are operated by BNSF with continuous power from load point to unload point and back to the next load point. BNSF's grain shuttle train program entails a reduced rate applicable to the shuttle unit plus a per car credit for loading the entire train within BNSF-specified time and another per car credit for unloading the train within BNSF-specified time. Facilities that originate and receive grain shuttles accordingly must be equipped with extensive track to accommodate an entire train and with high speed load and unload facilities in order to earn the loading and unloading credits. The reduced rates available under the shuttle tariff and from the load/unload incentives help justify, along with certain construction incentives occasionally provided by BNSF in the form of per-car shipping refunds, the very substantial expenditures that shippers must make in order to engage in the loading of grain shuttle trains. They are, however, a highly efficient manner of utilizing BNSF assets (e.g. cars, locomotives, and personnel) and BNSF prioritizes the placement and movement of such assets.

7. In addition to the fact that BNSF and other railroads simply do not supply certain types of cars essential to the operation of many of Cargill's business units, rail-

road car supply, including BNSF car supply, has at times been inadequate to insure a continued flow of raw materials into processing plants or of finished product from the plants.

8. Cargill's private car fleet has been in existence for many, many years to provide an essential means of enabling Cargill to meet its plant production requirements for raw materials, to deliver processed products to points of consumption or further processing, and to help Cargill meet its commercial commitments, including management of its export grain program. Absent an adequate supply of rail cars, whether as a conduit for raw materials such as corn, soybeans, and wheat, or as a conduit for delivering processed products, many of Cargill's facilities would not have been built or acquired.

9. Even where a railroad such as BNSF does maintain an inventory of a type of car that Cargill needs, such as one usable for the transportation of grain, the railroad's purpose in supplying cars is not the same as Cargill's purpose in operating private cars. Cargill acquires cars to operate its plants, to meet customer demand, and because the cost to Cargill of inadequate or deferred car supply can be immense in terms of lost sales, breach of contract damages, plant restart costs, etc. Railroads, on the other hand, including BNSF, do not acquire cars to keep shipper production facilities operating as smoothly as possible at all times, but instead to meet what Douglas Langston of BNSF called "average demand" in an earlier statement related to this case, a standard that will not meet all of Cargill's car supply needs.

10. Cargill's numerous rail-loading facilities were constructed at a time when all major railroads, including BNSF and its predecessors, provided virtually unlimited railroad trackage on which to hold empty private cars prior to placement for loading. When these processing plants, grain elevators, and other originating facilities were con-

structed, land was not acquired, and facilities were not designed, to hold all empty private cars that would return to that facility for loading. In some cases, where not all land area at a facility was utilized in constructing the facility and its supporting plant trackage, the excess was held back for plant expansion as business conditions warranted.

11. When BNSF formally announced its new holding charges (demurrage for covered hopper cars handling grain and grain products and storage for all other cars) on February 1, 2001, to be effective May 1, 2001, Cargill believed that it had been given insufficient notice to attempt to rearrange freight car handling patterns that had been in existence for decades. BNSF made statements to Cargill employees that if it was impractical for Cargill to construct additional industry track or reduce fleet sizes, then BNSF was willing to consider leases of BNSF's trackage. Cargill did not believe 90 days was sufficient notice for Cargill to explore options to avoid imposition of the new charges, and requested BNSF to postpone its program for at least a year. Ultimately, BNSF postponed the effective date from May 1 to July 1, 2001, and refused requests for any additional extension of time. A new program that drastically changed how BNSF assessed charges on private cars was thus imposed on BNSF's customers only five months after the new program was announced.

12. The private car fleet that Cargill was operating when the new empty car holding charges took effect on July 1, 2001 was not excessive in number, and is not excessive in number today, considering that the purpose of that private car fleet is to keep Cargill's facilities operating and its customers satisfied and considering the variability in the consistency of the BNSF's service. Cargill's tank car fleet exists because Cargill must supply 100% of its tank car needs. Substantial segments of Cargill's private covered

hopper car fleet consist of specialty cars, such as pressure differential and air slide equipment, that railroads do not furnish. Some of Cargill's gravity-unload covered hopper cars are used to handle mammalian byproducts, such as bone meal or dried blood. Since 2004 BNSF and other railroads have not furnished cars for those loads.

13. Cargill does, of course, rely heavily on BNSF-furnished cars, and cars furnished by other railroads, for certain types of transportation, notably grain moving in shuttle or unit trains. BNSF in particular prefers to furnish its own cars for grain shuttle trains, which are capturing an increasing share of feed grain movements. BNSF equipment also is made available to some extent for grain products such as soybean meal. However, unlike grain, which often can abide rail shipment delays because back-ups in the rail transportation system result in grain remaining in on-farm storage, products such as soybean meal cannot sustain shipment delays because they are an ingredient in a further process that cannot go forward unless all of its components are present. For example, soybean meal is blended with components such as corn to produce animal and poultry feed. A delay in the shipment of a car of soybean meal will cause a disruption of a feed mill's entire production. Cargill cannot afford to rely solely on railroad equipment to handle products that especially require prompt and timely shipment. By requiring Cargill to furnish private cars to move commodities even where railroad equipment plays a partial role, the BNSF has substantially reduced its capital outlays and helped position itself to earn a broader base of revenue at a reduced risk level when there are fluctuations in demand for rail cars.

14. Sizing a private fleet cannot be accomplished with mathematical precision, whether by a railroad or by a shipper such as Cargill. Since our goal in providing private

cars is to keep our facilities operating and our customers satisfied, we take many contingencies into consideration in fleet sizing, including certain aspects of private car use that simply are not within Cargill's control. The most prominent example of this is rail transit time for both loaded and empty cars, which varies, often widely, for many reasons at many times. For example, rail service often worsens during the winter due to weather conditions, lengthening transit times and thereby adding to the number of cars necessary to keep a given volume of traffic moving. Cargill's customers nevertheless need product such as animal and poultry feed and food processing ingredients despite unfavorable weather conditions. More than occasionally, primary grain crops relied upon as a local source of feed grain or as a processing ingredient fail due to drought conditions, and substitute grains must be acquired from more distant points, thereby requiring additional car capacity. Railroads can make errors in estimating power requirements, personnel needs, and scheduling trains.

15. Occasionally, there are prolonged downturns in rail performance, including BNSF performance. In any such service downturn, railroad performance generally deteriorates, normally leaving just three options: forego business, damage Cargill's goodwill with its customers, or add rail cars. Cargill has had to add rail cars under these conditions. When service improves, the private cars added to compensate for the service downturn cannot simply be returned because they are subject to long-term leases.

16. Sometimes, private cars have to be added because of changes in railroad or government policy. For example, until 2004, BNSF furnished its own equipment to handle mammalian products, such as bone meal, which moves in covered hopper cars. In fact, BNSF maintained a pool of covered hopper cars dedicated to this type of transporta-



tion and assigned those cars to Cargill (without, I should add, requiring Cargill to enter into any written assignment agreements). In 2004, growing public and governmental sensitivity to mammalian product contamination issues caused BNSF to withdraw its cars from this type of service and required Cargill to supply its own cars exclusively, resulting in additions to Cargill's covered hopper car fleet. Similarly, in 2004, BNSF announced that it no longer would furnish its own covered hopper cars to transport dried distillers grain, a byproduct of ethanol production used as a feed ingredient. Cargill again had to supplement its private fleet.

17. Despite everything, Cargill's fleet overall has declined in size between 2000 and 2005, although the tank car component has increased. This result is in part due to the fact that Cargill has, over time, been able to substitute larger covered hopper cars for older, smaller capacity cars. At the same time, it has experienced a growth in demand for products that move in tank cars. By and large, BNSF has been a good business partner for Cargill, enabling, if not encouraging, growth in Cargill's tank car-reliant businesses through the publication of competitive rates for Cargill.

18. When BNSF announced its new policy toward empty private cars in February 2001, drastically limiting the use of BNSF tracks for holding empty cars, Cargill was faced with what at that time was an imminent \$75 per car per day demurrage bill for an empty grain covered hopper car held on BNSF tracks in excess of free time, and a \$25 a day storage charge for any other type of equipment, including a tank car, likewise held beyond the free time, and Cargill found itself with few reasonable alternatives. Simply cutting down the size of its private fleet was not a viable option. In 2001, all of Cargill's private cars were under leases, and most of those leases were for multi-year terms, in

some cases as long as fifteen years; and Cargill's business units needed the cars to keep functioning. Even now, with cars in high demand, short-term leases are virtually unavailable. Simply shedding cars was not an option for another reason; Cargill's facilities could not rely on BNSF cars to a sufficient extent to permit a reduction in Cargill's private cars.

19. Next, Cargill examined the possibility of constructing additional industrial track at BNSF-served facilities. It concluded, however, that 12 such facilities could not accommodate additional industrial track. Cargill investigated the possibility of leasing track from BNSF to ameliorate the impact of the new charges, and actually entered into "floating" track leases at four points served by BNSF. Each lease allowed Cargill to utilize BNSF trackage to hold up to a specified number of cars at a specified annual rental per track-foot. At three of the points, Dodge City, KS, Plainview, TX, and Fort Morgan, CO, all rural points, BNSF demanded rental in the amount of \$        per track-foot, which was more than Cargill had paid BNSF under preexisting leases for loaded car track space. Those leases, and the rentals paid to BNSF, are in BNSF's possession. At those Cargill facilities where industry track expansion is not possible and where trackage was not leased from BNSF, Cargill either ships small volumes of rail traffic or has so far been fortunate enough to be able to use existing industry trackage without incurring empty car holding charges. The "floating leases" preferred by BNSF entitle BNSF to place Cargill's cars on any piece of trackage chosen by BNSF, rather than on specific track dedicated to Cargill. It has been Cargill's experience that, under such leases, Cargill's private cars occupy essentially the space in BNSF yards as they did when BNSF provided unlimited

storage space for private cars, only now BNSF receives lease payments when the cars occupy the same track.

20. Cargill is aware that certain railroads other than BNSF have published differing forms of charges applicable to empty private cars. Many, if not all, such railroads serve Cargill facilities. These include Canadian National, Union Pacific, and CSX. Nevertheless, Cargill has paid no empty private car holding charges to any of these three railroads. In part, that is because Union Pacific's charges exclude all cars engaged in the transportation of grain and grain products. Canadian National's program involves negotiated car storage agreements that provide an unlimited number of days of empty car storage for a sufficient number of cars to keep a facility operating for a given number of days, with application of this program on a discretionary basis. CSX began its system-wide program early in 2005, allowing 20 days' free time. Norfolk Southern has no empty car holding charges. BNSF's empty car holding charge program clearly is the most broad, severe program of any of the major carriers.

21. Cargill has, however, incurred empty car holding charges from one railroad, Louisiana and Delta ("L&D"), a short line railroad serving a Cargill industrial salt facility at Breaux Bridge, LA. Unlike the BNSF, L&D is not a double-track track railroad with extensive yard facilities. Its main line consists almost entirely of trackage rights over a Class I railroad, and it reaches Breaux Bridge via its own stub-end, single track, branch line. It established an empty holding car charge of \$10.00 per car per day because its connecting lines, BNSF and Union Pacific, would not hold empty private cars until ordered in by Cargill, even though those larger railroads received the lion's share of revenue generated by the private cars, particularly in comparison to the revenue received

by L&D. Cargill specifically requested BNSF to provide holding track for empty private cars loading on L&D, even through lease arrangements, but BNSF would not do so. Cargill decided to accept and pay the L&D charges when incurred, rather than litigating, because Cargill felt that L&D's problems partly were a result of policies imposed by L&D's much larger connecting lines, and partly because Cargill does not receive erratic service from L&D that contributes to empty car accumulations, but does receive erratic service from L&D's Class I connections.

22. Several of the Cargill facilities served by BNSF are operated by CMS, a corporate subsidy of Cargill that slaughters, and markets beef, pork, poultry, and their byproducts. All components of the Cargill private car fleet serving the CMS facilities are engaged in the movement of commodities other than grain or grain products, so that those cars fall under the BNSF Storage Book, rather than the BNSF Demurrage Book. Between July 2001 and January 2005, Cargill's CMS division paid to BNSF \$        in empty private car storage charges. A list of such charges by month is attached as Appendix A hereto. Cargill seeks a refund of those payments.

23. When Cargill joined in the initial complaint filed in this proceeding, it did so not only on behalf of itself as a sole corporate entity, but on behalf of, and as agent for, its corporate subsidiaries and affiliates, including CMS. BNSF is fully aware that Cargill acts as an agent for such subsidiaries. Representatives of BNSF meet and negotiate with officials of Cargill, sometimes in conjunction with CMS representatives and sometimes not, to negotiate freight rates and rail transportation contracts, even if those contracts ultimately are signed by CMS. More importantly, the relationship between Cargill and CMS is known to BNSF because Cargill, and not CMS, pays BNSF bills for freight

transportation provided by BNSF to CMS and Cargill actually paid the \$            in storage charges for which refunds are sought. In this respect, CMS is no different than other Cargill subsidiaries served by BNSF; BNSF negotiates rates and contracts with Cargill on behalf of all its subsidiaries, and Cargill pays their freight charges to BNSF. I have not the slightest doubt that BNSF officials were at all times relevant to this case fully aware that Cargill was acting on behalf of all of its business units, subsidiaries, and affiliates, including CMS.

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VERIFICATION

Frank Sims, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.

Frank B. Sims

Subscribed and sworn to before me this 18<sup>th</sup> day of July, 2005.



Greta Liisa Liubakka 07/18/05  
Notary Public

My commission expires 1/31/10.



VERIFIED STATEMENT  
OF  
BRYAN GUSTAFSON  
ON BEHALF OF  
CONAGRA FOOD INGREDIENTS COMPANY, FORMERLY KNOWN AS  
CONAGRA TRADE GROUP

1. My name is Bryan Gustafson. I am Director, Rail Transportation, for ConAgra Food Ingredients Company, formerly known as ConAgra Trade Group ("ConAgra"). ConAgra is primarily a branded food company with some agribusiness operations that require transportation for a variety of products including feed grains, wheat, flour, food products, and both dry and liquid food ingredients. In April 2005, ConAgra operated covered hopper cars, including specialty cars such as pressure differential and air slide cars, tank cars; and boxcars, all of which were under lease for terms ranging from 6 months to 16 years.

2. ConAgra and its affiliates operate 92 separate facilities at which rail cars are loaded, including private cars at some such facilities. These 92 facilities are served by all Class I railroads operating in the United States with the exception of Kansas City Southern. Twenty-four of ConAgra's facilities are served by BNSF Railway Company ("BNSF").

3. Despite ConAgra's widespread use of private cars for loading on virtually all railroads in the United States, ConAgra has incurred charges for holding its empty private cars on railroad tracks prior to placement for loading from only one railroad; BNSF. Those charges were incurred at plants formerly operated by ConAgra at Grand Island, NE and Etter, TX. Both of those facilities were transferred to Swift & Co. in



2004, but continue to be served as originating points by ConAgra. Total charges accrued by ConAgra at these two points for holding of empty cars by BNSF prior to placement for loading have amounted to approximately \$ . To curtail the continuation of these charges, which would have continued to mount, ConAgra leased "floating" track space from BNSF at both points, and would have leased additional track space had BNSF been willing to make additional track space available. Private cars that formerly were held for ConAgra by BNSF at no charge, and later held subject to BNSF's demurrage and storage charges instituted in July 2001, continue to be held by BNSF in the same general track area as previously, at whatever points in BNSF's yards are selected by BNSF (just as previously), subject to "floating" rental payments that place a maximum on the number of cars that can be held for ConAgra. BNSF has reserved the right to cancel these arrangements on 30 days' notice.

4. ConAgra was fortunate that the BNSF empty private car charges that took effect in July 2001 caused ConAgra to incur demurrage and storage penalties at only two points. However, were BNSF to change its policies, reducing or eliminating free time beyond the limits presently contained in its tariffs, ConAgra no doubt would incur charges at additional points served by BNSF. At many of those points, ConAgra would not have the physical capacity to construct additional private holding tracks within industry confines and would be solely at the mercy of BNSF for the continuation of business activities, just as ConAgra became at Grand Island and Etter when it had to depend on BNSF to lease additional holding track.

5. Although ConAgra is served by virtually all major U.S. railroads at points where ConAgra loads private cars, and while some of those railroads have various poli-

cies limiting free storage of empty private cars prior to loading, ConAgra has incurred no demurrage or similar charges from any railroad other than BNSF because the policies of other railroads are far more flexible than those of BNSF. CSX, which serves a large number of ConAgra facilities, allows 20 days' free time for holding empty private cars. Canadian National has not chosen to insist that ConAgra enter into any type of limiting agreement with respect to holding empty private cars, and Union Pacific does not apply its empty car provisions to any equipment engaged in the transportation of grain or grain products, which essentially excuses those ConAgra private cars that originate loads at UP facilities. The adoption of industry-wide practices similar to those of BNSF in all likelihood would jeopardize the ability of ConAgra to maintain present business levels and to increase business levels because payment of holding charges of up to \$50.00 per car per day on empty private equipment would negate many market opportunities. It is unrealistic to expect a private car fleet such as that operated by ConAgra for use in instances where railroads such as BNSF fail to supply their own equipment to be pared down significantly because of the unpredictability of service provided by BNSF and similar carriers. Transit times for loaded and empty cars vary so substantially that it becomes extremely difficult, if not impossible, to rely on a minimally sized fleet that will keep ConAgra's pipelines of inbound and outbound commodities filled and its customers satisfied.

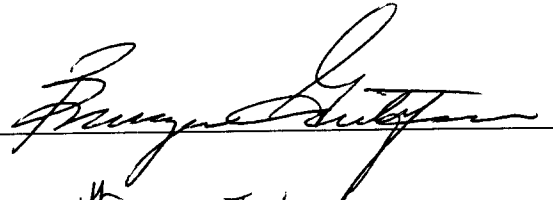
6. If railroads feel that they need additional track infrastructure on which to hold empty cars prior to placement for loading, they, including BNSF, are welcome to discuss those issues with ConAgra. BNSF did not do so before it instituted its new empty private car policies in early 2001. Where ConAgra has space available to construct additional track, and does not have plans to use that space for industrial expansion, ConAgra

would be more than willing to consider arms-length arrangements under which BNSF can negotiate for the use of that space. That, however, was not the path chosen by BNSF. Instead, it elected to unilaterally institute a strict regime of empty private car holding charges which have given BNSF leverage over customers such as ConAgra, requiring us to deal with BNSF on its terms rather than on a mutual, arms-length basis.

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VERIFICATION

Bryan S. Gustafson, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.



Subscribed and sworn to before me this 12<sup>th</sup> day of July, 2005.

  
Notary Public

My commission expires April 1, 2008.





**EXHIBIT NO. 7**

VERIFIED STATEMENT  
OF  
LYNN A. HISER  
ON BEHALF OF  
TATE & LYLE INGREDIENTS AMERICAS, INC.

1. My name is Lynn A. Hiser. I am Director, Transportation Americas, for Tate & Lyle Ingredients Americas, Inc. ("Tate & Lyle"), formerly known as A. E. Staley Manufacturing Company. Tate & Lyle is a major processor of corn products moving in both dry and liquid form. These include sweeteners, meal, and feed ingredients. Tate & Lyle does not operate any facilities served by BNSF Railway Company ("BNSF"). It does, however, originate private car shipments at facilities served by Canadian National Railway, CSX Transportation, Norfolk Southern Railroad, and Union Pacific Railroad. As a long-standing member of North America Freight Car Association ("NAFCA"), Tate & Lyle wishes to explain why the types of private car holding charges imposed by BNSF would be highly detrimental to Tate & Lyle were those charges to spread to other railroads serving Tate & Lyle facilities.

2. To accommodate the transportation of its corn products, Tate & Lyle operates covered hopper cars and tank cars, all under lease, mainly for multiple-year terms up to 18 years in duration. Our company operates these cars because railroads do not furnish tank cars and seldom have a sufficient supply of the type of covered hopper car necessary to move dried corn products.

3. Tate & Lyle operates seven facilities in the U.S. at which its products are loaded into private rail cars. Three of the carriers serving those facilities – CN, UP, and CSX – have instituted charges and rules of various types applicable to empty private cars

while on carrier track prior to loading. In no case, however, has Tate & Lyle incurred any charge under such tariffs because each of those carriers has taken a position which is more flexible toward at least agricultural products than the position of BNSF. Union Pacific does not apply its empty private car holding charges to equipment used to transport grain or grain products, whether that equipment consists of tank cars, covered hopper cars, or other types of cars. CSX recently instituted a program of empty private car holding charges, but allows 20 days' free time. Canadian National has exhibited an extremely flexible outlook toward Tate & Lyle, choosing to notify us if they believe that our company is holding too many empty private cars at a CN-served facility for too long a period of time, and urging us to take corrective steps as soon as feasible. CN has recognized that the number of private cars required by Tate & Lyle to load products is partially a function of business conditions, so that private car storage needs increase as business improves. CN does not approach private car accumulations on a traditional "free time" per car basis, but instead works with Tate & Lyle to recognize the volume of private cars necessary to keep our facilities operating. Part of this process entails acknowledgement by CN that its service, or the service of connecting lines over which Tate & Lyle cars move after origination at CN facilities, is not always consistent. Tate & Lyle has not been required to enter into any empty private car storage agreements with CN and has received no CN bills for holding empty private cars. Norfolk Southern, which serves two of Tate & Lyle's major facilities, has no empty private car holding charges at all.

4. Tate & Lyle has on many instances found it necessary or appropriate to lease to track from a carrier for the purpose of holding private cars while under load. In some instances, these tracks have been leased near our customers' facilities so that loaded

cars do not incur destination demurrage while being held on carrier tracks. In other instances, carrier trackage has been leased adjacent to Tate & Lyle's origination facilities so that loaded cars can be held if they are loaded before and released to the carrier before routing instructions are available. Since the year 2000, Tate & Lyle has entered into carrier track leases at points in Illinois, Oregon, and California with three different carriers in amounts ranging from \$5.50 to \$6.50 per track foot per year.

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VERIFICATION

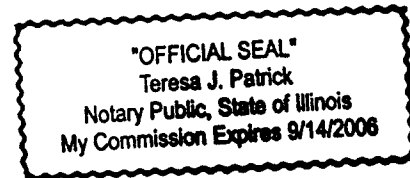
Lynn A. Hiser, being duly sworn, deposes and says that the foregoing discovery responses are true and correct, to the best of his knowledge, information and belief.

Lynn A. Hiser

Subscribed and sworn to before me this 12<sup>th</sup> day of July, 2005.

Teresa J. Patrick  
Notary Public

My commission expires 9/14/2006.





**BEFORE THE PUBLIC VERSION  
SURFACE TRANSPORTATION BOARD**

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<b>NORTH AMERICA FREIGHT CAR ASSOCIATION, Complainant</b>	) ) ) ) ) )	
<b>V.</b>	)	<b>Docket No. 42060 (Sub-No. 1)</b>
	) ) )	
<b>THE BNSF RAILWAY COMPANY,  Defendant</b>	) ) )	

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**I. INTRODUCTION**

1. We are Thomas D. Crowley and Philip H. Burris. Mr. Crowley is an economist and President of L.E. Peabody & Associates, Inc. Mr. Burris is Senior Vice President of L. E. Peabody & Associates, Inc. The Firm's offices are located at 1501 Duke Street, Alexandria, Virginia, 22314. Mr. Crowley's qualifications and Mr. Burris' qualifications are included as Attachment No. 1 and Attachment No. 2 to this verified statement, respectively.
2. North America Freight Car Association ("NAFCA") has requested that we examine BNSF Railway Company's ("BNSF") handling of empty system cars in "C" pool assigned service while at the last station prior to placement for loading to determine the amount of time that lapses from time of arrival to the actual or constructive placement of the empty railcar. NAFCA has also requested that we estimate the return of investment at the per car level on one mile of storage track that is produced by storage charges of \$10, \$20 and \$30 per day.

3. Our statement is organized as follows:

- II. Background
- III. Summary of Evidence
- IV. Handling of BNSF System Empty Cars in Assigned Service
- V. Return on Investment from Storage Charges
- VI. Conclusions

## **II. BACKGROUND**

- 4. Effective July, 1, 2001, BNSF imposed storage and demurrage charges on empty private cars waiting for loading. These charges are contained in BNSF's Private Car Storage Book 6005, Item 1300 (cars held for loading on railroad controlled or public delivery tracks) and in BNSF's Demurrage Book 6004-A.<sup>1</sup>
- 5. On August 8, 2001, NAFCA filed a complaint with the Surface Transportation Board ("STB" or "Board") in this proceeding, which challenged BNSF's storage and demurrage charges on empty private cars contending that the imposition of these charges on private cars is an unreasonable practice, and constitutes a failure to furnish adequate cars service.<sup>2</sup>
- 6. BNSF filed a motion to dismiss the complaint, arguing that it is overly broad and individual complaints can be filed if there are specific instances of hardship or abuse due to the application of the storage or demurrage charges to private cars. By its order of August 13, 2004 in this proceeding, the Board denied BNSF's motion to dismiss and directed the parties to file a proposed joint procedural schedule in this proceeding.

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<sup>1</sup> Both of these tariffs are available on BNSF's website.

<sup>2</sup> See, the STB decision served August 13, 2004 in Docket No. 42060 (Sub-No.-1), North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company.

### **III. SUMMARY OF EVIDENCE**

7. A private car is either placed at the shipper's facility upon arrival, or constructively placed as soon as it arrives at the last station prior to loading. (See accompanying verified statement of NAFCA Witness Mack.) Further, BNSF begins assessing demurrage or storage charges on private cars as soon as they are constructively placed prior to loading.
8. In contrast, an empty railroad car in assigned service must be ordered into a shipper's facility prior to being either actually placed or constructively placed. No demurrage charges on the empty railroad car accrue unless a shipper fails to accept the car on the "want date" and it is constructively placed. (See Mack, V.S.) However, as a railroad car in assigned service can be routed to the last station prior the shipper's facility and wait at that location without being ordered into the shipper's facility, it can effectively wait at that station with no charge to the shipper.
9. We examined BNSF's handling of its empty "C" pool system cars in assigned service prior to actual placement or constructive placement for loading, and to determined how much time lapses from arrival at the last station to the actual placement or constructive placement of the railcar.
10. Based on our examination of a representative sample of the car movement event data provided by BNSF in discovery in this proceeding, we find that the time between arrival at the last station prior to actual placement or constructive placement for empty BNSF system cars in assigned service was { } days in the 2001 through 2002 time period and { } days in the March 2004 through February 2005 time period.
11. Based on our findings, we conclude that empty private cars which are either actually placed

or constructively placed, are handled differently than BNSF system cars at the last station prior to placement for loading. The fact that BNSF empty system cars spend up to { } days at the last station prior to actual placement or constructive placement, in effect means that BNSF empty system cars are being provided a time cushion prior to the assessment of demurrage and/or storage charges that is not afforded to empty private cars.

12. Based on our review of BNSF storage charges for empty private cars of \$10, \$20 and \$30 per car per day, we find that BNSF earns an annual return on its investment in storage tracks<sup>3/</sup> ranging between 19.4 percent and 70.1 percent, depending on the level of the storage charge and the length of the assumed amortization period.

#### **IV. HANDLING OF BNSF EMPTY SYSTEM CARS IN ASSIGNED SERVICE**

13. As stated previously, we were requested to examine the handling of BNSF system empty cars in assigned service at the last station prior to actual placement or constructive placement or actual placement for loading.
14. In order to perform this task, we examined car movement data provided by BNSF in discovery in this proceeding. This data includes car movement event records for years 2001, 2002 and the 12 month period of March 2004 through February 2005. The car event data includes all car events that occurred any place on BNSF's system during these time periods, regardless of the ownership of the car or type of service to which the car is assigned. The car movement data for the three year period included at total of 515 million car movement events.
15. The car movement data provided for each event shows the car initial and number, the location

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<sup>3/</sup> The cost to construct storage track is assumed to equal \$1.5 million per mile.

of the car movement event, the car event activity<sup>4/</sup>, the load or empty status of the car, the time and date of the event, waybill number, BNSF pool assignment, and Standard Transportation Commodity Code ("STCC").

16. As our examination was limited to BNSF system cars in assigned service we needed to identify only those cars in this service. Based on information provided by BNSF in discovery, we began by selecting car movement events associated with cars assigned by BNSF to "C" pools. "C" pool cars, according to the UMLER<sup>5/</sup> Data Specification Manual, include cars which are "assigned to a specific shipper at a specific location".<sup>6/</sup> As BNSF includes private cars in assigned service in their designated "I" pools<sup>7/</sup>, the BNSF system cars in assigned service are in the "C" pools.
17. The car movement events for cars in the "C" pool were aggregated into the 2001 through 2002 and the March 2004 through February 2005 time periods. To further refine the car movement events included in the universe of cars considered, we developed the following.
18. BNSF system cars were identified based on the car initials shown in the Official Equipment Register<sup>8/</sup> as being cars owned by BNSF. Added to these cars were "C" pool cars with private marks which, based on information provided by BNSF in discovery, are leased by BNSF.

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<sup>4/</sup> Car event activities include, for example, train arrival, train departure, order to spot, constructive placement, actual placement, released empty, released loaded, etc.

<sup>5/</sup> Uniform Machine Language Equipment Register

<sup>6/</sup> UMLER Data Specification Manual, Section VIII, Specifications for Pool Header and Car Assignments, Item C, Pool Type Codes.

<sup>7/</sup> According to a February 28, 2005 email to NAFCA's counsel from BNSF's counsel, the "I" pool designation is an internal BNSF designation and not an UMLER car pool designation. The "I" pool generally includes privately owned cars not leased by BNSF and BNSF system cars in company service.

<sup>8/</sup> The Official Railway Equipment Register, Vol. 120, No. 4, April 2005, pp. RR-63 to RR-118.

Based on these BNSF system and leased cars in the "C" pools, a list of unique car initials and car numbers was developed which we used to draw a sample of cars for both the 2001 through 2002 and the March 2004 through February 2005 time periods.

19. In order to confirm that the "C" pool cars are in assigned service, we determined the percent of empty car cycles where a "C" pool car was returned to the last loading point for reloading. We found that for "C" pool cars in the 2001 through 2002 period there were a total of { } empty cycles for the 60 sample cars. Of these empty cycles, the car was returned to the previous location for loading in { } instances, or { } percent of the time. For the March 2004 through February 2005 period, there were { } empty cycles for the 60 sample cars and of these the car was returned to its previous location for reloading in { } instances or { } percent of the time.
20. Table No. 1, below shows the number of unique "C" pool cars and the number of car movement events associated with those cars for both the 2001 through 2002 and the March 2004 through February 2005 time periods.

<b>Table No. 1</b> <b><u>BNSF System Cars ("C" Pool Cars) in Assigned Service</u></b>		
<b><u>Item</u></b>	<b><u>2001 to 2002</u></b>	<b><u>Mar 2004 to Feb 2005</u></b>
(1)	(2)	(3)
1. Number of cars	{ }	{ }
2. Number of movement events (million)	{ }	{ }

21. Two 60 car samples were selected, one each from the unique lists of "C" pool cars for each time period.<sup>9</sup> All of the car movement events for each of the sample cars were then identified

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<sup>9</sup> Each of the sample cars in the two 60 car samples are shown in Exhibit\_(TC/PB-1).



from the universe of car event data. For each sample car, all of the empty cycles and their associated car movement events were identified. The car movement events occurring at the last station prior to actual placement or constructive placement for each empty cycle were examined to determine how BNSF handled the sample cars. Table No. 2 below summarizes the average time from arrival at the last station prior to actual placement or constructive placement<sup>10</sup> to the time of actual placement or constructive placement for each sample.

<b>Table No. 2</b> <b>BNSF Empty System Cars in Assigned Service</b> <b><u>Average Time of Arrival at Last Station to Actual or Constructive Placement (days)</u></b>		
<u>Item</u>	<u>2001 to 2002</u>	<u>Mar 2004 to Feb 2005</u>
(1)	(2)	(4)
1. Number of Sample Cars	60	60
2. Number of Empty Cycles	( )	( )
3. Empty Days from TA to AP or CP		
a. Average Days per Cycle	( )	( )
b. Two-Sided Confidence Interval – Days		
i. 95 percent	+/- 0.84	+/- 0.37
ii. 99 percent	+/- 1.10	+/- 0.49
c. One-Sided Confidence Interval – Days		
i. 95 percent	- 0.71	- 0.31
ii. 99 percent	- 1.00	- 0.44
Source: Exhibit (TC/PB-1)		

22. As stated previously, private cars are either placed at the shipper's facility upon arrival, or

<sup>10</sup> The last station prior to actual placement or constructive placement is defined as the station where constructive placement occurs if there is a constructive placement, or where actual placement or patron (shipper) notification of the car's availability occurs if there is no constructive placement.

constructively placed as soon as it arrives at the last station prior to loading. BNSF begins assessing demurrage or storage charges on private cars as soon as they are constructively placed prior to loading. In contrast, empty railroad cars in assigned service must be ordered into a shipper's facility prior to being either actually placed or constructively placed and demurrage charges on the empty railroad car accrue only if the car is constructively placed. However, as a railroad car in assigned service can be routed to the last station prior the shipper's facility and wait at that location without being ordered into the shipper's facility, it can effectively wait at that station with no charge to the shipper.

23. As shown in Table No. 2, BNSF system cars in assigned service spent {    } days in the last station prior to actual placement or constructive placement in the 2001 through 2002 time period and {    } days in the March 2004 through February 2005 time period.
24. Empty private cars which are either actually placed or constructively placed, are handled differently than BNSF system cars at the last station prior to placement for loading. The fact that BNSF empty system cars spend up to {    } days at the last station prior to actual placement or constructive placement, means that BNSF empty system cars are being provided a time cushion prior to the assessment of demurrage and/or storage charges that is not afforded to empty private cars.
25. The calculation of the 95 percent and 99 percent confidence intervals around the averages shown in Table No. 2 above, demonstrates the statistical significance of our study results.

#### **IV. RETURN ON INVESTMENT FROM STORAGE CHARGES**

26. The BNSF storage charges assessed to empty private cars at issue in this proceeding equal \$10, \$20 or \$30 per car per day depending on the location of the car. BNSF provided a series

of tables in discovery purporting to show the annual payment "Per Foot required to Pay for Storage Lease Tracks".<sup>11</sup> These tables show the annual payments per track foot for five different construction costs ranging from \$750,000 to \$2,500,000 per mile, interest rates ranging from 9.0 percent per year to 15.0 percent per year and amortization periods of 10 years to 50 years. BNSF's showing does not address the reasonableness of the storage charges assessed on privately owned cars.

27. A meaningful measure of the reasonableness of storage charge is the return on investment to BNSF that storage charges yield. To determine BNSF's return on investment, we accepted BNSF's storage construction cost alternative of \$1,500,000 per track-mile and its premise that a car spot requires 55 feet of track. Based on these parameters, and amortization periods of 10, 15 and 20 years, we calculated BNSF's effective return on investment from the \$10, \$20 and \$30 storage charges for one mile of storage track. The results of our analysis is summarized in Table No. 3, below.

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<sup>11</sup> See Exhibit\_TC/PB-2

**Table No. 3**  
**Return on Investment from BNSF Storage Charges**

<u>Item</u>	<u>Storage Charge per Day</u>		
	<u>\$10</u>	<u>\$20</u>	<u>\$30</u>
	(1)	(2)	(3)
1. Annual Revenue	\$350,381	\$700,814	\$1,051,195
2. Return on Investment			
a. Amortized over 10 years	19.4%	45.6%	69.7%
b. Amortized over 15 years	22.2%	46.6%	70.1%
c. Amortized over 20 years	23.0%	46.7%	69.7%

Sources: Line 1 = Storage charge times 365 days times cars per mile (5,280/55feet).  
Line 2 = ROI on \$1.5 million investment at annual payment shown in line 1, for years in lines 2.a. through 2.c.


## **V. CONCLUSIONS**

28. We find that BNSF handles BNSF system empty cars in assigned service in a manner different than it handles private cars. BNSF provides a time cushion prior to the assessment of demurrage charges that is not afforded empty private cars. This time cushion was equal to {    } days in the 2001 through 2002 time period and {    } days in the March 2004 through February 2005 time period.
29. We also conclude that BNSF's per day storage charges yield a return on investment in the cost of construction of storage track range from 19.4 percent to 69.7 percent.

## VERIFICATION

COMMONWEALTH OF VIRGINIA )  
 )  
CITY OF ALEXANDRIA )

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Thomas D. Crowley

Sworn to and subscribed before me  
this day of July 28, 2005.


Anthony V. Evanshaw III  
Notary Public for the State of Virginia

My Commission expires: September 30, 2007

## VERIFICATION

COMMONWEALTH OF VIRGINIA )  
 )  
CITY OF ALEXANDRIA )

I, PHILIP H. BURRIS, verify under penalty of perjury that I have read the foregoing Verified Statement of Philip H. Burris, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Philip H. Burris

Sworn to and subscribed before me  
this day of July 28, 2005.

*Anthony V. Evanshaw III*  
 \_\_\_\_\_  
 Anthony V. Evanshaw III  
 Notary Public for the State of Virginia

My Commission expires: September 30, 2007

**THOMAS D. CROWLEY**

Mr. Crowley is an economist and President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, marketing, and transportation problems. Mr. Crowley is a graduate of the University of Maine from which he obtained a Bachelor of Science degree in Economics. He has also taken graduate courses in transportation at The George Washington University in Washington, D.C. He spent three years in the United States Army and has been employed by L. E. Peabody & Associates, Inc. since February, 1971. He is a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering Association.

As an economic consultant, Mr. Crowley has organized and directed economic studies and prepared reports for railroads, freight forwarders, and other carriers, for shippers, for associations, and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies in which he has participated include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled Mr. Crowley to become familiar with the operating and accounting procedures utilized by railroads in the normal course of business.

Additionally, Mr. Crowley and/or his associates have inspected both railroad terminal and

line-haul facilities used in handling unit train coal movements from the Eastern Coal Fields to various utility destinations in the southeastern portions of the United States. These field trips were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal.

Mr. Crowley presented testimony before the ICC in Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines - Nationwide, which is the proceeding that established the methodology for developing a maximum rail rate based on stand-alone costs. He has submitted evidence applying the ICC's (now the Board's) stand-alone cost procedures in numerous rail rate cases. He has also developed and presented numerous calculations utilizing the various formulas employed by the ICC and Board (both Rail Form A and URCS) to develop variable costs for rail common carriers. In this regard, Mr. Crowley was actively involved in the development of the URCS formula, and presented evidence to the ICC analyzing the formula in Ex Parte No. 431, Adoption of the Uniform Railroad Costing System for Determining Variable Costs for the Purposes of Surcharge and Jurisdictional Threshold Calculations.

As a result of his extensive economic consulting practice since 1971 and his participating in maximum-rate, rail merger, and rule-making proceedings before the ICC and the Board, Mr. Crowley has become thoroughly familiar with the operations, practices and costs of the rail carriers that operate in the United States.



**PHILIP H. BURRIS**

Mr. Burris is a Senior Vice President of L. E. Peabody & Associates, Inc., an economic consulting firm with offices in Alexandria, VA. Mr. Burris received a BS in Business Administration from Virginia Polytechnic Institute and State University in 1971 and a MBA from the American University in 1978, specializing in transportation economics. Mr. Burris has worked in the consulting industry for a period of 27 years. In addition to his current position as a Senior Vice President of L.E. Peabody & Associates, Inc., Mr. Burris has been an employee of the following consulting firms: A. T. Kearney, Wyer Dick & Associates, Inc. and George C. Shaffer & Associates.

Mr. Burris has extensive experience in the field of transportation economics as it pertains to transportation supply alternatives, plant location analysis, regulatory policy and dispute resolution before regulatory agencies as well as state and federal courts. He has designed, directed and executed analyses of the costs of moving various commodities by different modes of transportation including rail, barge, truck, pipeline and intermodal. He has also performed economic analyses of maximum reasonable rate levels for the movement of coal and other commodities using the Board's CMP methodology, and specifically, the stand-alone cost constraint. Mr. Burris has submitted evidence regarding maximum reasonable rate levels using the stand-alone cost constraint to the Board and its predecessor. He has also testified before the Railroad Commission of Texas, the Colorado Public Utilities Commission, the Illinois Commerce Commission, the Public Service Commission of Nevada and various state and federal courts.

In addition to his consulting work for private clients, Mr. Burris has performed studies and

**Attachment No. 2**

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written draft reports for the Railroad Accounting Principles Board, an independent body created by Congress to establish cost accounting principles for use in implementing the regulatory provisions of the Staggers Act of 1980.

**REDACTED**

**REDACTED**

# PER FOOT PAYMENT REQUIRED TO PAY FOR STORAGE LEASE TRACKS

Dollars Borrowed:		
	Per Mile	Per 55' Car Spot
Dollars:	\$2,500,000	\$26,042

Rate	Period in Years								
	10	15	20	25	30	35	40	45	50
9.00%	(\$74)	(\$59)	(\$52)	(\$48)	(\$46)	(\$45)	(\$44)	(\$44)	(\$43)
9.50%	(\$75)	(\$60)	(\$54)	(\$50)	(\$48)	(\$47)	(\$46)	(\$46)	(\$45)
10.00%	(\$77)	(\$62)	(\$56)	(\$52)	(\$50)	(\$49)	(\$48)	(\$48)	(\$48)
10.50%	(\$79)	(\$64)	(\$58)	(\$54)	(\$52)	(\$51)	(\$51)	(\$50)	(\$50)
11.00%	(\$80)	(\$66)	(\$59)	(\$56)	(\$54)	(\$53)	(\$53)	(\$53)	(\$52)
11.50%	(\$82)	(\$68)	(\$61)	(\$58)	(\$57)	(\$56)	(\$55)	(\$55)	(\$55)
12.00%	(\$84)	(\$70)	(\$63)	(\$60)	(\$59)	(\$58)	(\$57)	(\$57)	(\$57)
12.50%	(\$86)	(\$71)	(\$65)	(\$62)	(\$61)	(\$60)	(\$60)	(\$59)	(\$59)
13.00%	(\$87)	(\$73)	(\$67)	(\$65)	(\$63)	(\$62)	(\$62)	(\$62)	(\$62)
13.50%	(\$89)	(\$75)	(\$69)	(\$67)	(\$65)	(\$65)	(\$64)	(\$64)	(\$64)
14.00%	(\$91)	(\$77)	(\$71)	(\$69)	(\$68)	(\$67)	(\$67)	(\$66)	(\$66)
14.50%	(\$93)	(\$79)	(\$74)	(\$71)	(\$70)	(\$69)	(\$69)	(\$69)	(\$69)
15.00%	(\$94)	(\$81)	(\$76)	(\$73)	(\$72)	(\$72)	(\$71)	(\$71)	(\$71)

Payment is a per foot dollar requirement necessary to pay for lease track construction.

Dollars Borrowed:		
	Per Mile	Per 55' Car Spot
Dollars:	\$2,000,000	\$20,833

Rate	Period in Years								
	10	15	20	25	30	35	40	45	50
9.00%	(\$59)	(\$47)	(\$41)	(\$39)	(\$37)	(\$36)	(\$35)	(\$35)	(\$35)
9.50%	(\$60)	(\$48)	(\$43)	(\$40)	(\$39)	(\$38)	(\$37)	(\$37)	(\$36)
10.00%	(\$62)	(\$50)	(\$44)	(\$42)	(\$40)	(\$39)	(\$39)	(\$38)	(\$38)
10.50%	(\$63)	(\$51)	(\$46)	(\$43)	(\$42)	(\$41)	(\$41)	(\$40)	(\$40)
11.00%	(\$64)	(\$53)	(\$48)	(\$45)	(\$44)	(\$43)	(\$42)	(\$42)	(\$42)
11.50%	(\$66)	(\$54)	(\$49)	(\$47)	(\$45)	(\$45)	(\$44)	(\$44)	(\$44)
12.00%	(\$67)	(\$56)	(\$51)	(\$48)	(\$47)	(\$46)	(\$46)	(\$46)	(\$46)
12.50%	(\$68)	(\$57)	(\$52)	(\$50)	(\$49)	(\$48)	(\$48)	(\$48)	(\$47)
13.00%	(\$70)	(\$59)	(\$54)	(\$52)	(\$51)	(\$50)	(\$50)	(\$49)	(\$49)
13.50%	(\$71)	(\$60)	(\$56)	(\$53)	(\$52)	(\$52)	(\$51)	(\$51)	(\$51)
14.00%	(\$73)	(\$62)	(\$57)	(\$55)	(\$54)	(\$54)	(\$53)	(\$53)	(\$53)
14.50%	(\$74)	(\$63)	(\$59)	(\$57)	(\$56)	(\$55)	(\$55)	(\$55)	(\$55)
15.00%	(\$75)	(\$65)	(\$61)	(\$59)	(\$58)	(\$57)	(\$57)	(\$57)	(\$57)

Payment is a per foot dollar requirement necessary to pay for lease track construction.

# PER FOOT PAYMENT REQUIRED TO PAY FOR STORAGE LEASE TRACKS

Dollars Borrowed:

	Per Mile	Per 55' Car Spot
Dollars:	\$1,500,000	\$15,625

	Period in Years									
Rate	10	15	20	25	30	35	40	45	50	
9.00%	(\$44)	(\$35)	(\$31)	(\$29)	(\$28)	(\$27)	(\$26)	(\$26)	(\$26)	
9.50%	(\$45)	(\$36)	(\$32)	(\$30)	(\$29)	(\$28)	(\$28)	(\$27)	(\$27)	
10.00%	(\$46)	(\$37)	(\$33)	(\$31)	(\$30)	(\$29)	(\$29)	(\$29)	(\$29)	
10.50%	(\$47)	(\$38)	(\$35)	(\$33)	(\$31)	(\$31)	(\$30)	(\$30)	(\$30)	
11.00%	(\$48)	(\$40)	(\$36)	(\$34)	(\$33)	(\$32)	(\$32)	(\$32)	(\$31)	
11.50%	(\$49)	(\$41)	(\$37)	(\$35)	(\$34)	(\$33)	(\$33)	(\$33)	(\$33)	
12.00%	(\$50)	(\$42)	(\$38)	(\$36)	(\$35)	(\$35)	(\$34)	(\$34)	(\$34)	
12.50%	(\$51)	(\$43)	(\$39)	(\$37)	(\$37)	(\$36)	(\$36)	(\$36)	(\$36)	
13.00%	(\$52)	(\$44)	(\$40)	(\$39)	(\$38)	(\$37)	(\$37)	(\$37)	(\$37)	
13.50%	(\$53)	(\$45)	(\$42)	(\$40)	(\$39)	(\$39)	(\$39)	(\$38)	(\$38)	
14.00%	(\$54)	(\$46)	(\$43)	(\$41)	(\$41)	(\$40)	(\$40)	(\$40)	(\$40)	
14.50%	(\$56)	(\$47)	(\$44)	(\$43)	(\$42)	(\$42)	(\$41)	(\$41)	(\$41)	
15.00%	(\$57)	(\$49)	(\$45)	(\$44)	(\$43)	(\$43)	(\$43)	(\$43)	(\$43)	

Payment is a per foot dollar requirement necessary to pay for lease track construction.

Dollars Borrowed:

	Per Mile	Per 55' Car Spot
Dollars:	\$1,000,000	\$10,417

Rate	Period in Years								
	10	15	20	25	30	35	40	45	50
9.00%	(\$30)	(\$23)	(\$21)	(\$19)	(\$18)	(\$18)	(\$18)	(\$17)	(\$17)
9.50%	(\$30)	(\$24)	(\$21)	(\$20)	(\$19)	(\$19)	(\$18)	(\$18)	(\$18)
10.00%	(\$31)	(\$25)	(\$22)	(\$21)	(\$20)	(\$20)	(\$19)	(\$19)	(\$19)
10.50%	(\$31)	(\$26)	(\$23)	(\$22)	(\$21)	(\$21)	(\$20)	(\$20)	(\$20)
11.00%	(\$32)	(\$26)	(\$24)	(\$22)	(\$22)	(\$21)	(\$21)	(\$21)	(\$21)
11.50%	(\$33)	(\$27)	(\$25)	(\$23)	(\$23)	(\$22)	(\$22)	(\$22)	(\$22)
12.00%	(\$34)	(\$28)	(\$25)	(\$24)	(\$24)	(\$23)	(\$23)	(\$23)	(\$23)
12.50%	(\$34)	(\$29)	(\$26)	(\$25)	(\$24)	(\$24)	(\$24)	(\$24)	(\$24)
13.00%	(\$35)	(\$29)	(\$27)	(\$26)	(\$25)	(\$25)	(\$25)	(\$25)	(\$25)
13.50%	(\$36)	(\$30)	(\$28)	(\$27)	(\$26)	(\$26)	(\$26)	(\$26)	(\$26)
14.00%	(\$36)	(\$31)	(\$29)	(\$28)	(\$27)	(\$27)	(\$27)	(\$27)	(\$27)
14.50%	(\$37)	(\$32)	(\$29)	(\$28)	(\$28)	(\$28)	(\$28)	(\$28)	(\$27)
15.00%	(\$38)	(\$32)	(\$30)	(\$29)	(\$29)	(\$29)	(\$29)	(\$28)	(\$28)

Payment is a per foot dollar requirement necessary to pay for lease track construction.

# PER FOOT PAYMENT REQUIRED TO PAY FOR STORAGE LEASE TRACKS

Dollars Borrowed:

	Per Mile	Per 55'
Dollars:	\$750,000	\$7,813

	Period in Years								
Rate	10	15	20	25	30	35	40	45	50
9.00%	(\$22)	(\$18)	(\$16)	(\$14)	(\$14)	(\$13)	(\$13)	(\$13)	(\$13)
9.50%	(\$23)	(\$18)	(\$16)	(\$15)	(\$14)	(\$14)	(\$14)	(\$14)	(\$14)
10.00%	(\$23)	(\$19)	(\$17)	(\$16)	(\$15)	(\$15)	(\$15)	(\$14)	(\$14)
10.50%	(\$24)	(\$19)	(\$17)	(\$16)	(\$16)	(\$15)	(\$15)	(\$15)	(\$15)
11.00%	(\$24)	(\$20)	(\$18)	(\$17)	(\$16)	(\$16)	(\$16)	(\$16)	(\$16)
11.50%	(\$25)	(\$20)	(\$18)	(\$17)	(\$17)	(\$17)	(\$17)	(\$16)	(\$16)
12.00%	(\$25)	(\$21)	(\$19)	(\$18)	(\$18)	(\$17)	(\$17)	(\$17)	(\$17)
12.50%	(\$26)	(\$21)	(\$20)	(\$19)	(\$18)	(\$18)	(\$18)	(\$18)	(\$18)
13.00%	(\$26)	(\$22)	(\$20)	(\$19)	(\$19)	(\$19)	(\$19)	(\$19)	(\$19)
13.50%	(\$27)	(\$23)	(\$21)	(\$20)	(\$20)	(\$19)	(\$19)	(\$19)	(\$19)
14.00%	(\$27)	(\$23)	(\$21)	(\$21)	(\$20)	(\$20)	(\$20)	(\$20)	(\$20)
14.50%	(\$28)	(\$24)	(\$22)	(\$21)	(\$21)	(\$21)	(\$21)	(\$21)	(\$21)
15.00%	(\$28)	(\$24)	(\$23)	(\$22)	(\$22)	(\$21)	(\$21)	(\$21)	(\$21)

Payment is a per foot dollar requirement necessary to pay for lease track construction.





**VERIFIED STATEMENT  
OF GEORGE H. BORTS**

My name is George H. Borts. I am a Professor of Economics at Brown University. My complete qualifications are attached as Appendix A.

I have been requested by Complainants to comment on certain positions taken by BNSF Railway Company ("BNSF") with respect to rules and charges it imposed in July 2001 for empty private rail cars while on BNSF track awaiting placement at shipper facilities for loading ("Private Car Storage Tariff"). I have read the Verified Statement of Douglas Langston dated June 9, 2003 in STB Docket 42060 (Langston V.S.) and his rebuttal Verified Statement dated July 7, 2003 ("R.V.S.")

**UNBUNDLING.**

1. The Langston V.S. indicates that unbundling of service is a goal and justification for the Private Car Storage Tariff. Unbundling is the practice of establishing separate prices for components of a product or service rather than offering it for sale only as a complete package. Unbundling is designed to provide a buyer with an option that offers a lower price for the product when it features fewer accessories and components. In the case of automobiles the price would reflect the presence or absence of accessories such as a moon roof or a satellite navigation system. Buyers who decide not to purchase accessories pay a lower price.

2. Unbundling is usually associated with an increase in competitive opportunities for producers of components and accessories who may now offer part of the complete package but not all of it. Under such circumstances it leads to an increase in consumer welfare, because some buyers will be attracted who would have found the complete package too expensive. However, in the present case the "unbundled" package that BNSF offers shippers represents an application of monopolistic power that reduces their economic welfare. The reason is that BNSF is raising the price of both the bundled and the unbundled options.

3. BNSF claims that its Private Car Storage Tariff gives an unbundled option to shippers who supply private cars. The full service option allows parking the car on BNSF property in return for the payment of a fee, while the low service option requires the owner to park the car on private land. These options reduce the economic welfare of shippers who provide their own cars. BNSF is not giving these customers an option that would reduce their costs. Not only must private car customers pay a fee to park on rail property, but they also enjoy no reduction in rail rates should they wish to furnish their own empty car holding track; indeed, taking into account the use value of their land, they experience even higher transportation costs.

4. Those shippers who supply private cars are truly "captive" shippers, probably even more so than shippers who rely on rail equipment, since the private car fleet represents an investment in, and thus a commitment to use, rail service. Moreover, there is no evidence that BNSF's remaining shippers have received a reduction in rates as a result of the so-called unbundling.

5. Earlier testimony by BNSF's Douglas Langston implies that, over time, making shippers pay for private car storage will avoid rate increases that might be imposed on those who do not use private cars. But this fails to enlarge the economic opportunities facing the shippers who provide cars and must now pay to park, either on BN property or their own. BNSF cannot claim that these options benefit the private car shipper, who now confronts two unpleasant alternatives: pay a parking charge for keeping cars idle more than two days (or in some instances more than one day) on BNSF property, or use private land to park idle cars. Either choice raises the costs and lowers the economic welfare of the shipper-provider of private cars.

6. Moreover the imposition of a parking tax on private car providers can distort economic efficiency if it induces shippers to use property for parking that has more productive alternatives than rail owned property.

7. The effect of BNSF's Private Car Storage Tariff is therefore to change the balance of economic advantage toward those shippers who use rail owned cars against the shippers who use private cars. This is carried out without any evidence that it is more expensive for the railroad to provide the same service to shipper-provided cars than rail-owned cars. All cars using the railroad, regardless of ownership, are capable of clogging

the system. The tariff is therefore a discriminatory pricing ploy masquerading as an action taken to increase rail operating efficiency.

8. Although they have clothed their program as aimed at reducing congestion and improving operating efficiency, all of the standard measures of rail operating performance have worsened after the program was instituted. Measures such as train velocity, terminal dwell time, and on-time performance declined or remained virtually static on BNSF between 2001 and 2004, as shown on Langston Dep. Ex. 13, contained in Vol. II of this filing, produced by BNSF in discovery. BNSF's announcement of its program stated that it was designed to "improve asset utilization for our customers and effectively expand capacity without additional capital outlays". Instead, what it has done is force capital outlays on its customers and increase revenues from the imposition of parking charges on their cars.

#### **CONGESTION.**

9. Approximately 54% of all freight cars nationwide are private cars, and Class I railroads are supplying a declining part of the national fleet. On any given day on BNSF, there are large numbers of both private cars and cars controlled by BNSF, both making use of BNSF facilities. Although BNSF claims that a primary goal of its empty private car charge is to reduce "congestion" (never defined by BNSF), it is impossible to identify the private cars as the sole cause of any "congestion" that may exist. Indeed there is no proof that BNSF has even had to construct more track on account of private cars. In fact, its inventory of siding and switching track is declining, as shown on Langston Dep. Ex. 16, contained in Vol. II of this filing, also produced by BNSF in discovery.

10. Congestion on a rail line may be relieved in a number of ways: by expanding infrastructure, by reducing the number of cars entering the traffic flow, and by reducing the number of idle cars blocking traffic. There are methods by which a railroad can charge customers to induce them to use a congested facility in an efficient fashion. One example is a charge that applies only during periods of high traffic. All users would be charged a price high enough to ration the congested facility, enough to relieve the slowdown of traffic flow. This serves two functions: it induces all car users to shift demand to alternative sources of supply or to less congested periods. Second it generates revenue to

help pay for the expansion of the congested facility. If congestion is caused by a failure to use cars promptly enough, then the cost of that failure should be borne by anyone who orders a car that has been sitting idle until ordered.

11. It is inappropriate, however to make the suppliers of private cars the sole financial source of infrastructure expansion, should it become necessary. Congestion relief benefits BNSF and its entire customer base. Shippers using private cars have no objection to increases in railroad efficiency, but they do object to financing infrastructure improvements that will benefit other shippers (some of whom may be their competitors) who will not contribute to its cost.

12. I understand that in Mr. Langston's deposition, he said that if a private car and a railroad car each occupy the same railroad track, there is no way to tell which is causing any congestion that may exist. In his V.S., he said that there were 2686 empty private cars that had been on track for more than 30 days as of April 30, 2001, and only 991 similar cars on May 7, 2003. A document produced by BNSF in discovery, Langston Dep. Ex. 21, which is in Vol. II, shows that, on April 30, 2001, BNSF had a total of cars stored more than 30 days, so if 2686 were private, the rest were rail-owned or controlled cars. On May 7, 2003, there were according to the same document total cars stored more than 30 days, and all but were carrier cars. As of February 1, 2005 there were over stored serviceable rail owned or controlled cars on BNSF. If BNSF was a parking lot for unused cars causing congestion, the finger can hardly be pointed at private cars. If congestion exists on BNSF, one cannot point to one class of cars as the cause.

13. As Mr. Langston reportedly said in his deposition, "A car is a car is a car." If no one car causes more congestion than any other car, why should some cars have to bear the cost of making the system better for all cars?

#### **REDUCTION OF THE PRIVATE FLEET; LONG-TERM RESULTS OF BNSF POLICY.**

14. BNSF claims that shippers operate too many cars and operate them inefficiently. It also claims that "the tank car fleet might very well be smaller if BNSF supplied all of the tank cars." In contrast to the private owners of tank cars and covered hopper

cars who “purchase or lease enough cars to handle peak demand”, “BNSF generally tries to have enough cars to meet average demand.” (R.V.S p. 5)

15. BNSF also claims that “shippers do have the ability to adjust the size of their tank car fleets to avoid incurring storage charges. Shippers can enter into short-term leases that allow them to respond more readily to swings in supply and demand.” (R.V.S p. 7)

16. The above claims ignore the causes of variation in the demand for freight cars and overstate the extent to which resources may be saved by using fewer cars or leasing them for shorter periods of time.

17. There is evidence that BNSF transit times on both loaded and return empties coming back to a loading point are erratic and therefore unpredictable by the shipper. Actual transit times vary from BNSF schedules, requiring the shipper to store empty cars to fulfill production and delivery schedules.<sup>1</sup> Were all the cars operated under those circumstances owned by the railroad, it would seem appropriate that BNSF and all of its customers would have to bear the consequences flowing from those service difficulties, whether in the form of additional carrier holding track or otherwise.

18. Poor service for private cars makes it impossible for a shipper to size its fleet so that it never has more empty cars on hand than those it will utilize in the next day or two. BNSF is passing on to its private car shippers the costs of those service failures by imposing charges that it admits are designed to make the shipper add capacity and infrastructure to compensate for poor service without carrier capital outlay. That is an excessive use of market power and not a proper allocation of cost among customers.

19. In addition to the need for cars to offset railroad operating problems, shippers need cars to meet peak demands for service arising from seasonal and cyclical variation in customers needs. The railroad can hold a smaller stock of cars, safe in the knowledge that shippers will make up the difference in car inventory in order to avoid losing business. It is not a sign of inefficiency to hold a car inventory sufficient to transport peak harvests or satisfy peak seasonal demands. The alternative to a higher car inventory is a higher level of storage capacity, and shippers would gladly use fewer cars if storage were an economical substitute.

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<sup>1</sup> See the Verified Statement of Randy Neumayer on Behalf of Archer Daniels Midland Company.

20. Moreover, those shippers who require private cars, because BNSF either deliberately maintains a shallow fleet, or does not furnish equipment at all (tank cars and specialty covered hopper cars), do not have the option of modifying their leases to respond more rapidly to swings in supply and demand. Indeed, in the long run, cars owners are likely to add the cost of idle time and storage to the rental charges they impose for making cars available on short-term lease, thus wiping out any possible saving to the shipper from modification of the lease duration.

21. BNSF asserts that, where it is a supplier of freight cars, it supplies only enough cars to meet "average demand." This forces shippers who are reliant on rail service to acquire fleets that, by definition, are at greater risk than the BNSF fleet. Considering the very substantial \$ or so in revenues which BNSF earns from that segment of the private fleet at which the new demurrage and storage charges are aimed, BNSF should reward its customers' risk rather than imposing additional infrastructure costs on those customers responsible for the considerable revenue that BNSF concedes it would not have the freight car capacity to earn under its own fleet-sizing principles.

22. For the past year or more and at present, there has been a greater demand for rail service than railroads appear able to meet, and rail rates have been escalating steadily and sharply because railroads see current conditions as a seller's market. Rail traffic has, in fact, increased, and there is a heavy demand for freight cars. The owners/lessors of those cars cannot be expected in such a marketplace to offer their equipment on a short-term basis. Government policy has been to support railroad mergers that led to the retirement or divestiture of Class I railroad capacity, now resulting in higher prices as demand for rail services increases. As demand increases, rail cars are called upon to make a greater number of trips per year, which positions car suppliers to demand extended, not shorter, leases.

Appendix A  
QUALIFICATIONS OF GEORGE H. BORTS

My name is George H. Borts. I am an economist. My address is 220 Slater Avenue, Providence, Rhode Island, 02906. I am a Professor of Economics at Brown University in Providence, Rhode Island,. I was managing editor, from 1969 to 1980, of the American Economic Review, a publication of the American Economic Association. In 1990 and 1991, I served as managing editor of the Brown University World Business Advisory.

I hold a B.A. degree from Columbia University; a Master of Arts and a Ph.D. degree from the University of Chicago.

I am a member of the American Economic Association and Phi Beta Kappa.

The title of my doctoral thesis is "Cost and Production Relations in the Railway Industry." I have written a number of articles on cost functions and production functions in railroads. These were published in Econometrica and the Journal of Political Economy. I have also written on the indexation of rail contracts for the Transportation Journal.

In regulatory matters, I have presented evidence before the Federal Energy Regulatory Commission concerning market power in oil pipelines. I have served as a consultant to various Canadian provinces in several proceedings, investigations, and studies. I completed a study of cost of capital requirements for Canadian railroads, and presented evidence before the Canadian Transport Commission.

I have presented evidence before the Interstate Commerce Commission on issues involving cost finding, the cost of capital, revenue adequacy, the determination of market dominance and monopoly power, measurement of railroad productivity, freight car sup-

ply, compensation for the use of private hopper and tank cars, and railroad cost recovery procedures.

Most recently, I presented evidence before the Surface Transportation Board in Docket No. 42071, Otter Tail Power Company v. Burlington Northern and Santa Fe Railway Company; Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Railway Company; Docket No. 42057, Public Service Company of Colorado v. Burlington Northern and Santa Fe Railway Company; Docket No. 42070, Duke Energy Corporation v. CSX Transportation Inc. ; Docket No. 42069, Duke Energy Corporation v. Norfolk Southern Railway Company; Docket No. 42054, PPL Montana LLC v. Burlington Northern and Santa Fe Railway Co.; Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific Railroad Co.; Docket No. 42022, FMC Wyoming Corp. v. Union Pacific Railroad Co.; Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc.; Docket Nos. 41626, 41242, and 41295, the so-called Bottleneck Regulation Cases; Finance Docket No. 32760, Union Pacific Corporation - Control and Merger - Southern Pacific Rail Corporation; and Finance Docket No. 32630 (Sub. No. 1), Omaha Public Power District - Burlington Northern Railroad Company, Crossing Compensation.

I have also presented evidence before the Interstate Commerce Commission in Finance Docket No. 32549, Burlington Northern Railroad Company - Control and Merger - The Atchison, Topeka and Santa Fe Railway Company; Docket No. 41242, Central Power and Light Company v. Southern Pacific Transportation Company; Docket No. 37038, Bituminous Coal--Hiawatha, Utah to Moapa, Nevada; Docket No. 38025S, Dayton Power and Light Company v. Louisville and Nashville Railroad Company; Docket No. 38301 S, Coal Trading Corporation et al. v. Baltimore and Ohio Railroad et al.; Finance Docket No. 27590 (Sub-No. 1), Approval of the Pooling of Car Service With Respect to Flat Cars, Trailer Train Co., et al.; Docket No. 39169, Shippers Committee, OT-5, v. The Ann Arbor Railroad Company et al.; Ex Parte No. 347 (Sub-No.2), Rate Guidelines-- Non-Coal Proceedings; Docket No. 39896, U.S. Clay Producers Traffic Association, v. Boston and Maine Corporation et al.; and Docket No. 39117, LO Shippers Action Committee v. Aberdeen and Rockfish Railroad Company, et. al. I have also presented evidence in the Coal Rate Guidelines investigations, Ex Parte No. 347;



revenue adequacy investigations, Ex Parte No. 353 and 393; and market dominance investigations, Ex Parte No. 320.

In June 1986, I participated as one of four economic experts in the Railroad Accounting Principle Board's Colloquium on Cost Issues.

I have served as a consultant to the National Science Foundation, to the Undersecretary of Commerce for Transportation, to the New England Motor Freight Association, to the National Motor Freight Traffic Association, the Western Coal Traffic League, and to the New England Telephone Company.

I have also served as an arbitrator of disputes over rail freight contracts.

In addition to research in transportation, I am co-author of a book with J.L. Stein, entitled: Economic Growth in a Free Market, published by the Columbia University Press in 1964. I am author of a monograph entitled, Regional Cycles of Manufacturing Employment, published by the National Bureau of Economic Research in 1959. I have also published articles on regulatory matters and on regional and international economics in the American Economic Review, the Journal of Political Economy, the Journal of International Economics, and in various conference volumes.

VERIFICATION

George H. Borts, being duly sworn, deposes and says that the foregoing statement is true and correct, to the best of his knowledge, information and belief.

George H. Borts

Subscribed and sworn to before me this 15 day of July, 2005.

Arquino Spertini  
Notary Public

My commission expires 11/15/08.

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. 42060 (SUB-NO. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.

v.

BNSF RAILWAY COMPANY

---

COMPLAINANTS' OPENING STATEMENT  
OF FACT AND ARGUMENT

VOLUME II

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Public Record

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Dated: July 29, 2005

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1 Q. No, not TTX.

2 A. TTS, I've never heard that.

3 Q. Okay. I may have the wrong initials. Or ag  
4 customers, were they considered to be excluded?

5 A. No.

6 Q. Coal?

7 A. Coal is excluded.

8 Q. Coal is excluded?

9 A. (Witness nodded.)

10 Q. By contract or just by --

11 A. By contract.

12 Q. By contract. Did you give consideration to  
13 excluding seasonal commodities such as fertilizer?

14 A. No.

15 Q. Now, let's take a look, please, at the two  
16 programs as they are today. You may want to refer to  
17 the Exhibits 2 and 4.

18 A. Okay.

19 Q. On page 13, I believe it is --

20 A. Which one?

21 Q. I'm sorry. On page 18 of Exhibit 4, it states  
22 how constructive placement time is to be determined for  
23 covered hopper cars. Do you see that?

24 A. Item 1050E?

25 Q. Item 1050E.

1 Q. Okay. So you're pretty comfortable then that  
2 these 10, 15, \$25 differentiations do reflect reliable  
3 differences in congestion conditions on the railroad,  
4 right?

5 A. As a general matter, yes.

6 Q. Is congestion determined at all by particular  
7 car types? Do some car types tend to create more  
8 congestion than others?

9 A. In terms of congestion from an operating  
10 standpoint, congestion's a car's a car's a car. It's...

11 Q. So a covered hopper car with a \$50 per day  
12 demurrage charge in Iowa, for example, doesn't cause any  
13 more congestion than a tank car in Iowa with a \$10 a day  
14 charge, right?

15 A. We're -- We're --

16 Q. Assuming they're both sitting on BNSF's tracks?

17 A. Well, again, to answer that question, I need to  
18 know if there's a lot of them, and there's a lot of them  
19 cycling through and <sup>if</sup> it's an averaging *program*

20 Q. A car --

21 A. I can't answer that question without knowing.

22 Q. A car's a car's you just said, right?

23 A. Yes, but then what you did was took me to the  
24 tariff and the rate.

25 Q. I didn't take you to any tariffs.

1       A.    I'd have to look at the DPR and tell you, which  
2   is our daily performance report. I know that non-ag --  
3   I think there's about [REDACTED], and if you include ag, I  
4   think there's another -- I want to say another [REDACTED] or  
5   [REDACTED] but that's a guess. I'd have to look. I mean,  
6   I --

7       Q.    If I told you that I thought I saw a document  
8   in here someplace that said about [REDACTED] daily or --  
9   would you say that's probably about right?

10      A.    Probably about right.

11      Q.    And I think in response to one of our  
12   interrogatories -- I think it was 45, yeah, where we  
13   first -- where we asked -- I'm sorry, for the total  
14   freight revenue for BNSF for 2004, and I think your  
15   answer was, rough numbers, 10.95 billion?

16      A.    That's correct.

17      Q.    Then you originally said that [REDACTED] percent of  
18   that revenue is derived from private cars.

19      A.    That's correct.

20      Q.    And then later when it became clear that you  
21   were talking about only private cars that were subject  
22   to either demurrage or storage rules at that point.  
23   When we asked for a more expansive number, we were  
24   informed that the answer was [REDACTED] percent. Were you aware  
25   of that?



1 A. Yes.

2 Q. Okay. What's the difference between how you  
3 calculated the [REDACTED] percent and the [REDACTED] percent? What cars  
4 went into the difference?

5 A. Predominantly coal went into the difference,  
6 coal privates.

7 Q. No TTX or rail boxcars?

8 A. No.

9 Q. So the difference is just the addition of coal  
10 revenue?

11 A. Uh-huh.

12 Q. And what cars did you assume were subject to  
13 the [REDACTED] percent of the revenue that you provided in your  
14 first answer?

15 A. All industrial privates. Industrial meaning  
16 chemicals, plastics, aggregate, cement, lumber, any of  
17 the -- Well, we would classify at the railroad at  
18 industrial track private, all ag privates, consumer  
19 carload, consumer carload being refrigerated boxcars of  
20 canned goods, dry goods, predominantly boxcar type  
21 commodities. And that's what went into the 15 percent.

22 Q. It might have been easier if I'd asked you what  
23 you left out, perhaps. What did you leave out?

24 A. Predominantly intermodal because we don't view  
25 that as a private. First of all, we own part of TTX.

1 Secondly, we control the movement of those cars. So all  
2 of that's excluded. Auto is excluded. Auto box is not  
3 excluded. We included any auto box privates, but we  
4 just -- The cars that carry the automobiles because we,  
5 first of all -- Well, we own the racks. I mean, we --  
6 They're ours. What else? I told you excluded coal  
7 private in the first analysis.

8 Q. On the auto cars, they are what, TTX owns them?

9 A. Yeah, the bottoms are TTX and we own the racks,  
10 and the TTX, we own part of, so I -- I mean, we pay for  
11 them. We pay for their use. We lease them. I mean,  
12 it's just like a -- it's like a rail-controlled covered  
13 hopper that has private marks that we lease and we treat  
14 it as a rail-controlled car.

15 Q. Do you know what percentage of your revenue  
16 comes from the TTX and rail box and rail <sup>gon</sup>~~gun~~ fleets?

17 A. Well, rail <sup>gon</sup>~~gun~~ fleet's very, very small. I  
18 mean, the majority of it would be the -- the intermodal  
19 and automotive. And I want to say that would add  
20 another -- If you wanted to include that, I think I  
21 looked at the number and I think it added another  to  
22  percent.

23 Q. Without the private cars --

24 A. I have an 11:30 I have to step out for. That's  
25 what -- No, no, no. Eleven-thirty's fine.

1 sole supplier of tank cars, you'd only have enough to  
2 handle average demand?

3 MR. JENKINS: I'm sorry. Where did he say  
4 this?

5 MR. GOLDSTEIN: Well, I think --

6 Q. (BY MR. GOLDSTEIN) Let me ask you this: Is  
7 that what you've said at any point here in this case?

8 A. I don't recall, honestly. I've said a lot  
9 here. I mean, it's been three years.

10 Q. Yeah, it sure has. Let me try Exhibit 6. The  
11 bottom of page five, not in the footnote, but in the  
12 text.

13 A. Yeah, I see that now. Okay. I do recall that.  
14 Yeah. I mean, we generally size our fleets to -- to  
15 meet average demand. I mean, it's a general statement.  
16 There's a lot more that goes into it, but we don't  
17 build -- we don't build our fleet size to what we think  
18 our peak demand would be, otherwise we'd have a lot of  
19 cars sitting around for a lot of time.

20 Q. And you view the private fleet as being sized  
21 to meet peak demand; is that right?

22 A. I mean, that's a personal perspective, but,  
23 yeah, I think that the -- I think that the cost of  
24 private cars is -- I'm not going to get into trouble by  
25 going down that path, but I guess what I'm trying to say

1 is I think that it's easier to have enough cars around  
2 than not.

3 Q. Well, let me just refer you --

4 A. That's what I read.

5 Q. -- to the next to the last sentence. "In  
6 contrast, the vast majority of private tank car owners  
7 and private covered hopper car owners purchase or lease  
8 enough cars to handle peak demand."

9 A. I think that's certainly a correct statement.

10 Q. You're saying that if you supply the cars,  
11 there would be fewer of them, that is the cars that earn  
12 this [REDACTED] billion dollars, there would be fewer of them  
13 than if the shipper supplied the cars?

14 A. And we'd turn them a lot faster too.

15 Q. But the answer is there'd be fewer of them,  
16 right?

17 A. And we'd turn them faster.

18 Q. Is the answer there would be fewer of them?

19 A. Yeah, I guess there'd be fewer of them.

20 Q. All right.

21 A. And we would be more efficient with them.

22 Q. How would you make them more efficient?

23 A. We'd turn them faster.

24 Q. How would you do that? Let's take tank cars.

25 Tell me how you would turn tank cars faster than the

1 times. ~~Do~~<sup>1c</sup> not bear the burden of holding cars awaiting  
2 loading, unreasonably.

3 Q. Was there some reason for that? Just like to  
4 stop cars from sitting around? Do you have some goals  
5 beyond that that you were trying to achieve?

6 A. Fluidity, efficiency, velocity, reduce  
7 congestion.

8 Q. Hold on a second. Fluidity, velocity, reduce  
9 congestion.

10 A. My last comment was reduce congestion.

11 Q. Okay.

12 (Deposition Exhibit Number 9 was marked  
13 for identification.)

14 Q. (BY MR. GOLDSTEIN) I'm handing you a number of  
15 pages from your discovery responses that are marked as  
16 Bates 010657 (sic), 571, 569, 656, 657, 666, 667, 668,  
17 012075, 012076 and 010531. Would you turn to what  
18 should be the -- Well, first, let me ask you this: Do  
19 you see on the first of those pages 010567?

20 A. Uh-huh.

21 Q. Private equipment policy May 1, 2001?

22 A. Uh-huh.

23 Q. Was this a meeting, do you know, that was held  
24 or what was the occasion of May 1, 2001, that caused  
25 this document to be prepared?

1       A.    My understanding, and I -- and I -- I believe I  
2 put this together, was to educate our internal  
3 stakeholders on what the -- what the intent of the  
4 policy was about.

5       Q.    Are those your notes on the front or do you  
6 recognize them?

7       A.    I think they are my notes, actually. Yes, I  
8 believe those are my notes.

9       Q.    Turn to the next page, and it said what is the  
10 policy, and a charge for excess dwell on BNSF track.

11      A.    Uh-huh.

12      Q.    Is reducing dwell time another one of the goals  
13 that this policy was aimed at besides the ones you  
14 mentioned a few moments ago?

15      A.    I consider those one and the same.

16      Q.    Fluidity, velocity, congestion or --

17      A.    All contribute -- I mean, reducing dwell, all  
18 contribute to improved efficiency, less congestion and  
19 improved efficiency.

20      Q.    And then the third page 010569, of course,  
21 confirms what you just said, that one of your goals was  
22 to hit congestion?

23      A.    Uh-huh. Yes.

24      Q.    Would you turn, please, on 010656?

25      A.    656, yes, sir.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Q. Generally speaking, these floating leases use  
5 track that was within your yards?

6 A. Generally speaking, yes.

7 Q. So that if a shipper that had been availing  
8 himself of your prior policies, that is, those before  
9 the July 1 changes, wanted to lease track from you to  
10 store empty private cars after the changes took effect,  
11 the chance is pretty good that the cars would be in the  
12 same yard after the lease was entered into as they were  
13 before the lease was entered into; is that right?

14 A. Yes.

15 Q. Let's try the next one.

16 (Deposition Exhibit Number 15 was marked  
17 for identification.)

18 Q. [REDACTED] page

19 [REDACTED]

20 [REDACTED] S

21 [REDACTED]

22 [REDACTED] t

23 [REDACTED] ?

24 A. [REDACTED].

25 Q. [REDACTED]

1 Q. Less than 40? Less than 30? What do you  
2 think?

3 A. If I had to guess, I'd say there's -- I'll pull  
4 a number out. I'm going to say there's 25 other -- and  
5 that's a guess.

6 Q. Have you had any situations where a customer  
7 went ahead and ~~billed~~<sup>built</sup> track because they thought they  
8 were relying on your informal commitment to reimburse  
9 them, and then you --

10 A. No.

11 Q. -- didn't and you got into a disagreement with  
12 them?

13 A. No, no. I don't think we've ever been that --  
14 that rigid. I mean, if our word wasn't -- we put our  
15 word out there that we'd waive it in exchange for the  
16 track, we'd live by that commitment to the best of my  
17 knowledge.

18 MR. GOLDSTEIN: This is Exhibit Number 16.

19 (Deposition Exhibit Number 16 was marked  
20 for identification.)

21 Q. (BY MR. GOLDSTEIN) We asked you for the amount  
22 of track that had been constructed and retired in these  
23 years.

24 A. Okay.

25 Q. This is the document that you gave us back in



1 response. I believe it was taken -- or let me ask you  
2 this: Do you know if it was taken from reports or filed  
3 with any government agency?

4 A. I don't know. What we did was we reached out  
5 to our engineering department, and I think they sent it  
6 directly to you, Rob, didn't they?

7 MR. JENKINS: That's correct.

8 Q. (BY MR. GOLDSTEIN) Where empty cars are held  
9 on your railroad prior to being loaded, as a rule which  
10 category of track listed on this Exhibit 16 would they  
11 be held? The main track or yard switching track, which  
12 one would normally be the one that would hold those  
13 cars?

14 A. I would assume yard, but I know that we hold  
15 them all over the place.

16 Q. But as a general normal proposition, it would  
17 be yard switching tracks, wouldn't it?

18 A. I don't know what a way switching is. You'd  
19 have to define -- Somebody would have to define for me  
20 too what a way switching is. So switchings, sidings,  
21 crossovers. I would say sidings, yards and way would be  
22 the ones that held the majority of the cars.

23 Q. But not the main track?

24 A. Yeah, not in main track because -- But that  
25 doesn't mean that's where the majority -- I mean, it

1 only takes one car.

2 Q. Right. Is your understanding that crossover is  
3 a piece of track that crosses over several other tracks  
4 and connects them so --

5 A. I think so, yeah, but a siding to me would be  
6 fair game off of a mainline. I know of a lot of  
7 instances where we've in the past held a lot of empties,  
8 just put them in a siding somewhere.

9 Q. Okay. And would way switching tracks be those  
10 outside of the yard that are used by a switch crew when  
11 they have to park some cars and --

12 A. Oh, that -- If that's what that is, then  
13 definitely we store a lot out there.

14 Q. So the main ones would probably be what, way  
15 switching and yard switching?

16 A. And sidings.

17 Q. But you can't separate the sidings from the  
18 crossover?

19 A. Yeah, I can, so I don't know -- I mean, I  
20 would -- If I had to order them, I'd probably say yard,  
21 way and sidings, in that order.

22 Q. Okay.

23 A. But, again, these are all -- We don't...  
24 Well --

25 MR. GOLDSTEIN: Let's go to our next one,

1 all your agreements with Trailer Train --

2 A. Yeah --

3 Q. -- Railbox.

4 A. Yeah.

5 Q. And these are excerpts from the very large  
6 number of pages that you provided in response to that.

7 A. That's correct.

8 MR. GOLDSTEIN: I notice, Mr. Jenkins,  
9 that these are all marked "Highly Confidential." Are  
10 these contracts not filed with the STB, do you know, in  
11 the public docket?

12 MR. JENKINS: I don't know if they were  
13 filed by the STB. I was told the rates that are in here  
14 are confidential.

15 MR. GOLDSTEIN: Okay.

16 Q. (BY MR. GOLDSTEIN) My question -- Well, I  
17 might add this: These are Bates pages 011798 through  
18 804, then 810, 823, 824, 827, 831, 838, 843, 865, 885,  
19 886, 913, 917, 918, 919, 939.

20 Mr. Langston, without -- well, hopefully  
21 without having to go through all of these pages, let me  
22 just ask you whether BNSF is obligated by its agreements  
23 with Trailer Train Railbox, <sup>Langston</sup> ~~rail box~~ to store their cars  
24 for them from time to time?

25 A. We store Trailer Train cars assigned to BNSF

1 that we are paying on. So, yes, we do store Trailer  
2 Train cars, but if -- I'll go on and say this, if it's a  
3 Norfolk Southern or a UP Trailer Train car and we're  
4 storing it, we're continuing to pay on that car per  
5 diem. We can't just store cars. It's an allocation  
6 based on ownership and usage.

7 Q. Okay. As we continue this discussion of these  
8 things, can we agree that what you're answering me with  
9 respect to Trailer Train would also apply to railbox?

10 A. I think so, yes. Yes.

11 Q. And rail box is a supply of boxcars of various  
12 types; is that correct?

13 A. That's correct.

14 Q. Plain, unequipped boxcars --

15 A. I think so, yes.

16 Q. Okay.

17 A. I'm not an expert on the boxcars, so I'm not --

18 Q. And Trailer Train are cars used for intermodal  
19 service; is that correct?

20 A. That's correct. Predominantly, but we also  
21 have other flats; bulkheads, center beams.

22 Q. What's a center beam used for?

23 A. Lumber.

24 Q. So then what you're saying is if it's a Trailer  
25 Train car assigned to BNSF, you store it if it's not got

1 a load, right?

2 A. Uh-huh.

3 Q. If it's a car that came on to BNSF because it  
4 was assigned to another railroad, do you also store it  
5 under any -- Let me just stop there. Do you also store  
6 that car?

7 A. We used to return it to the other road.  
8 Whether we do that today or not, I don't know.

9 Q. Does whether you store a car or how long you  
10 store a car depend on whether that car has been declared  
11 a surplus car for your railroad or for some other  
12 railroad?

13 A. My understanding of the surplus connotation or  
14 whatever word you want to use, is that because it's an  
15 allocated car, you get 20, you get 30, you get 40, and  
16 if we determine everybody's -- has plenty of cars,  
17 they'll designate a surplus status, meaning I've got to  
18 be willing to give up the car back to Trailer Train, and  
19 Trailer Train has to say back to us, "No. We don't want  
20 it. We don't have a use for it. Store it." So it's a  
21 two-way street. We don't -- if we -- If we declare  
22 surplus, they can take the car from us if they -- If we  
23 try to give it back and they're in a surplus, what they  
24 generally -- you just don't pay on it for the time it's  
25 stored. We pay per diem. It's a lease right. We pay a

1 lease on those cars.

2 Q. If a car is a Trailer Train car under these  
3 agreements is assigned to BNSF, you can use that car,  
4 can't you, to load any place you choose; is that right?

5 A. Any place we want to take it, yes.

6 Q. Load it any place on your system for any  
7 destination; is that right?

8 A. I think so, yes. I think so.

9 Q. Do you remember seeing railbox boxcars go by  
10 with any load anywhere any time any place or something  
11 like that that's --

12 A. Yes. Yeah.

13 Q. That's more or less the rule, isn't it?

14 A. Yeah, on our system because it's assigned to  
15 us. It's not like a foreign car.

16 Q. Right. Right. If a car has been declared  
17 surplus, you have a certain number of -- I'm sorry,  
18 can Trailer Train direct you to move that car to some  
19 point?

20 A. If we declare surplus, they can direct us to  
21 give the car to the Norfolk Southern or the UP or some  
22 other railroad that may be in need of that car type.

23 Q. Can they -- Can Trailer Train declare a surplus  
24 of cars assigned to you?

25 A. ~~I don't know. I -- There is -- There's --~~  
*Yes, if we are not using it.*

1 There's -- They can come and say "You've got too many  
2 cars. We're going to take some because you're not  
3 utilizing them, even though you're paying on them," but  
4 they can't declare a surplus to us unless we set the car  
5 down.

6 Q. Is there a minimum number of days that you have  
7 to hold a car either before or after you declare it's a  
8 surplus car?

9 A. I think there is, and I think it's four days,  
10 or five days. I'm not -- I don't remember.

11 Q. Subject to check, would you agree it's five  
12 days?

13 A. Yeah, subject to check, I'd say five days is  
14 a -- When I managed center beams, that's what I  
15 remember, five days.

16 Q. Okay. And you consider these rail box Trailer  
17 Train cars basically to be railroad equipment rather  
18 than private equipment even though they're X marked?

19 A. Oh, absolutely.

20 Q. That's because of what reason?

21 A. We pay on those cars. We're paying a daily  
22 rent on those cars for the use of that car, much like a  
23 lease car -- exactly like a lease car, and then we have  
24 complete control over where that car goes.

25 Q. Unless it's declared surplus, in which case you

1 have to move your -- according to Trailer Train's  
2 directions?

3 A. Trailer Train doesn't declare it surplus unless  
4 we declare a surplus. I mean, my understanding and  
5 recollection of how the process worked was center beams,  
6 and I assume it works the same on the intermodal side,  
7 is that Trailer Train would be -- leave -- they never  
8 called us to say, "Hey, you're in surplus." What they  
9 would do is another railroad would call them and say,  
10 "Hey, I need center beams. You <sup>have</sup> got any lying around?"

11 So they would go out and look, and they'd  
12 say, "Hey, BNSF, you're sitting on some center beams  
13 that have been sitting for more than five days that I've  
14 subsequently turned off the per diem" because I pay  
15 those five days. I don't get them free. I pay on them  
16 up to five days, but once it sits in a location for five  
17 days, it then stops accruing charges.

18 They'll say, "I want those cars that have  
19 been sitting there for seven days because this railroad  
20 over here wants them." And then what I -- Then it's my  
21 decision to put them back into an active status and pay  
22 on them or give them up, so I have that option. I can  
23 either pay for them and use them or I can give them up.

24 Q. So when you put them in storage status, you're  
25 not paying rent on them?



1       A.    I pay for five days, and then it goes off the  
2 clock.

3       Q.    Pay five days, and then it goes off the clock?

4       A.    Right. That's my understanding.

5       Q.    Is there any internal rule of thumb on BNSF as  
6 to how many idle days these Trailer Train cars would  
7 have to undergo before you declare it to be a surplus  
8 car?

9       A.    It's a tough question because in the last three  
10 to four years we've not had any. I mean, there's been  
11 demand -- exceeded our supply for -- The rule of thumb  
12 three years ago was the fleet managers that managed  
13 their fleets, like the center beams as an example, and I  
14 assume the intermodal, again, was the same way, was if  
15 we didn't have a demand for those cars, we would set  
16 them down. We would call the Trailer Train and say,  
17 "Hey, we're going to set these down. Start the five-day  
18 clock so that it's free after five days." But there was  
19 never really a rule of thumb that I'm aware of.

20       Q.    So it made sense to store them for five days so  
21 you could get to the point where you didn't have to pay  
22 rent on them, right, if you didn't have a discernible  
23 need for the car?

24       A.    Right. Knowing that we're giving up the right  
25 and control of that car, that's correct.

1 Q. Okay. And then if Trailer Train said to you,  
2 "Okay. The car is in a storage status. We want to do  
3 something with it," you could decide to put it back on  
4 rent and make it an active car?

5 A. That's my understanding as I recall it.

6 Q. Okay. So these cars could stay on your line  
7 unused for a week or longer with or without rent?

8 A. No. With rent. Remember, you pay.

9 Q. Well, unless you put it in storage.

10 A. No. We're paying. Whether it's in storage or  
11 not, the first five days, we're paying.

12 Q. But after the first five days goes by, if it's  
13 not -- excuse me, if it's a storage car, there's no rent  
14 on it. So if you take, just as a scenario, the car's  
15 there for five days, it's then put into storage, it's  
16 their five days, you're paying rent, then put into  
17 storage, it's in storage for seven days, and Trailer  
18 Train says, "Do something with it," and you put it back  
19 on active, you could have a car there for ten or 12  
20 days, in this particular case, 12 days, just idle,  
21 paying rent and not paying rent as the case may be --

22 A. I'm making that economic decision, yes.

23 Q. Okay. I'm not saying it's an invalid decision,  
24 but I'm just trying to find out what goes on.

25 A. Right.

1 Q. Now, when the customer wants that car, how does  
2 the -- do they place a car order for it just like any  
3 other cars?

4 A. Just like any other car. <sup>They are</sup>~~They are~~ placing an  
5 equipment request. That doesn't happen with intermodal.  
6 That's just with our boxes and the TTZX beams and the  
7 bulkheads.

8 Q. And does the customer pay anything for the days  
9 when that car sat on your system idle and you were  
10 paying rent to Trailer Train, customer ultimately gets  
11 that car? Let me rephrase it.

12 Is the customer assessed anything like a  
13 storage or demurrage or daily charge for when that car  
14 was idle before it was ordered by the customer?

15 A. No. It's purely a railroad decision whether we  
16 want to keep that car and continue to pay on it or -- or  
17 not.

18 Q. And the same basically would be true of any  
19 piece of railroad equipment, wouldn't it, that is, that  
20 unless a customer orders a car and fails to take it when  
21 it's placed, the customer pays nothing for that car  
22 while it's on railroad tracks, an empty car, I'm sorry,  
23 prior to loading?

24 A. Well, yes. I mean, if we don't have a want  
25 date on that car, we're not going to charge him

1 demurrage.

2 V Q. It's ~~expensive~~ <sup>an expense of</sup> doing business for you to hold  
3 those cars on your tracks until an order is placed for  
4 those cars; is that right?

5 A. Yeah. That's a business decision based on  
6 forecasts and demand that we've been given by our -- our  
7 commercial group.

8 Q. Whatever the basis, it's an expense of doing  
9 business?

10 A. Yeah, it's in anticipation for revenue.

11 Q. Right.

12 MR. GOLDSTEIN: If you don't mind, I  
13 wouldn't mind adjourning for the day.

14 MR. JENKINS: That's fine.

15 (Proceedings adjourned at 4:17 p.m.)

16 \* \* \* \* \*

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1       A.     Certainly they can, but it's planned, and  
2     that's why we work with operations to make sure they're  
3     not in a place where they're going to create congestion.  
4     That's all the focus of this process.

5       Q.     If we take a look at -- I'm sorry. So you said  
6     you're going to try to put them where they won't create  
7     congestion?

8       A.     Correct, whereas the cars in here that are  
9     stored, showing stored, the [REDACTED], we just stored them  
10    at the serving yard because we just wanted to take them  
11    out of an active status.

12      Q.     When you look on the first page here, [REDACTED]  
13    cars that are storage serviceable, which of those can  
14    you tell me are causing congestion on BNSF or which are  
15    not?

16      A.     I can't answer that.

17      Q.     Any of them?

18      A.     I would tell you I think that the private cars,  
19    the tank cars and the private covered hoppers are  
20    probably sitting in the serving yards awaiting  
21    disposition to go into a facility because at the time  
22    this was done, we just took them out of an active  
23    status, but they're actually in the yards waiting to be  
24    spotted, so they're creating congestion.

25      Q.     Are you telling me that of [REDACTED] cars here

1 shown in storage serviceable equipment condition, only  
2 the private cars are causing congestion?

3 A. No.

4 Q. The railroad cars are also causing congestion,  
5 aren't they?

6 A. They could be, but what I was telling you is we  
7 plan -- try to plan to make sure that they're not in  
8 areas where they are causing congestion, whereas the  
9 privates we'd have no control or influence over because  
10 they come back and sit in the serving yard. There's a  
11 difference. There's a distinct difference between the  
12 two.

13 Q. The privates could be held short I thought you  
14 said in some of your testimony --

15 A. Could be --

16 Q. -- while in serving yards --

17 A. -- but as a general rule, they've already  
18 gotten where they're going to go.

19 Q. Your hands are not all together bound in that  
20 respect, are they?

21 A. Pretty much they are. I mean, we do -- When we  
22 hold it short, it's usually done in response to extreme  
23 congestion.

24 Q. Congestion can be caused by cars anywhere on  
25 your system I think you said --

1 route it.

2 (Deposition Exhibit Number 23 was marked  
3 for identification.)

4 Q. (BY MR. GOLDSTEIN) This is a two-page exhibit,  
5 consisting of Bates 014319 and 014320. Mr. Langston,  
6 these two pages have two items from BNSF tariff -- or a  
7 tariff to which BNSF subscribes I really should say;  
8 isn't that right?

9 A. Uh-huh.

10 Q. It's governing tariff for BNSF?

11 A. Yes.

12 Q. And item 73A pertains to tank cars?

13 A. Yes.

14 Q. Item 428A pertains to coal cars other than tank  
15 cars?

16 A. I believe that's correct.

17 Q. In each case, what these items say is that when  
18 a car is released from load, it is automatically reverse  
19 routed to its prior loading point unless prior to unload  
20 the railroad receives a new destination instruction for  
21 the car?

22 A. That's correct.

23 Q. So in all cases under these tariffs you do know  
24 where the private car is going before it's unloaded  
25 unless it's re-consigned -- or let's forget about that

1 A. What?

2 Q. Who issues it and what does it contain?

3 A. Well, it's issued by the AAR, and it defines  
4 all -- Well, the Umler book, yellow book, as we call it,  
5 as I understand it contains all the cars that are  
6 handled in North America and their specifications. It  
7 also defines car assignment rules, numbering schemes,  
8 pool schemes, interchange rules, car hire, pretty much  
9 all. It's the governing document for car handling for  
10 rail cars.

11 Q. Okay. And the sections that are included in  
12 Exhibit 24 from the Umler manual, are they, as far as  
13 you understand it, provisions that are prescribed by the  
14 AAR?

15 A. Yes.

16 Q. If you take a look, please, Bates 014158 under  
17 item E, there's a number of transportation code  
18 specifications applicable to assignable cars. Do you  
19 see those?

20 A. Yes.

21 Q. And code C cars are railroad cars assigned to a  
22 specific shipper at a specific location and the  
23 equipment is covered under the provisions of CSD, which  
24 means what, car service directive?

25 A. Yes, sir.



1 A. Yes, sir.

2 Q. Under the pool type on each of these pages,  
3 there are various letters.

4 A. That's correct.

5 Q. Can you tell us what pool type I signifies?

6 A. That is an internal pool.

7 Q. Meaning what, please?

8 A. We use that internally to -- for either  
9 tracking purposes or just general management purposes  
10 for cars on us. I mean, they're -- To give you an  
11 example, most of the private pools that we have are I  
12 pools and those are generally used for tracing purposes.  
13 So it allows customers with private cars to build  
14 reports to trace and track their cars.

15 Q. And the letter P under pool type, P pool, is  
16 that P a reference to the AAR designation of a P pool --

17 A. Yeah, restricted to a commodity pool.

18 Q. Pardon me, sir?

19 A. Car restricted to a commodity pool is what it  
20 says of transportation code specifications applicable to  
21 assigned cars.

22 Q. So it's the P on the equipment pools reports  
23 corresponds to the P designation under item E of the  
24 Umler manual --

25 A. Yes, that's my understanding.

1 they may -- lacking a place for them to go, they may go  
2 to a staging location.

3 Q. The C cars, as I understand it, are moved in  
4 accordance with the -- AAR's directions for handling C  
5 pool cars; is that right?

6 A. Yes, generally.

7 Q. Which means that these cars are assigned to a  
8 specific shipper at a specific location, and after being  
9 made empty, they're moved back to that shipper at that  
10 location; is that correct?

11 A. Generally, that's correct. They're moved back  
12 to the serving yard. We still require the customer to  
13 place orders to get the cars.

14 Q. And that's even though they're deemed to be  
15 assigned cars under the AAR rules; is that right?

16 A. That's correct, because a lot of them we don't  
17 have -- we have not entered into agreements with them.

18 Q. I'll get to that. Now, let's talk for a minute  
19 about the last page of this exhibit 012074. Would you  
20 tell us what is that, please?

21 A. That's a letter that -- a letter of agreement  
22 between BNSF and a customer to enter into a customer  
23 assigned pool by the strictest definition of customer  
24 assigned pools, meaning they will be responsible for  
25 those cars.

1 Q. Under that letter, the customer agrees to pay a  
2 \$25 per day storage fee if BNSF holds the car awaiting  
3 orders for placement; is that right?

4 A. That's correct.

5 Q. Now, do I understand that if you handle an  
6 assigned car under AAR pool code C, you will move that  
7 car empty back to the station where the assigned shipper  
8 is located, but --

9 MR. JENKINS: Assigned shipper?

10 Q. (BY MR. GOLDSTEIN) The shipper to whom the car  
11 is assigned?

12 A. We move it back to that serving yard, yes.

13 Q. But the car does not go on CP at that serving  
14 yard until the shipper orders are in; is that correct?

15 A. No.

16 Q. When does that car --

17 A. When it gets back to the serving yard.

18 Q. A pool C car?

19 A. Yeah, if we have this agreement with them.

20 Q. I didn't ask that.

21 A. But I'm answering your question, if it gets CP,  
22 and I'm telling you it gets CP'd if we have a letter of  
23 agreement with them.

24 Q. If you don't have a letter of agreement with  
25 them, what happens?

1       A.    It will generally go back to the serving yard,  
2   and then when they want a car, they have to place an  
3   order from us to get the car placed.

4       Q.    And it's still a pool C car?

5       A.    Uh-huh.

6       Q.    That's a yes; is that correct?

7       A.    Yes, that's a yes.

8       Q.    How about an N pool?  N as in Nancy.  What --

9       A.    National pools?

10      Q.    Yeah.  Do those cars get reverse routed as well  
11   when demand --

12      A.    Not necessarily.  They get reversed --

13      Q.    Let me change the question.  When they're made  
14   empty, do they get sent back to a loading station that's  
15   designated by the shipper or the pool agent?

16      A.    Not necessarily no, sir.  They can get moved  
17   based on demand, supply and demand, wherever they're  
18   needed.

19      Q.    Do they sometimes get moved back to the yard  
20   designated by -- Let me put it this way.  Look at the  
21   definition of an N pool, national pool car assigned to a  
22   specific shipper --

23      A.    But not a specific point.

24      Q.    But not a specific point?

25      A.    Right.

1 Q. You go on and say, "BNSF publishes its train  
2 schedules, switch times and makes them available on the  
3 Internet."

4 A. That's right.

5 MR. GOLDSTEIN: Mark this as Exhibit 25,  
6 please.

7 (Deposition Exhibit Number 25 was marked  
8 for identification.)

9 Q. (BY MR. GOLDSTEIN) Now, these two pages come  
10 from one of the complainant's document production in  
11 this case, and they're marked highly confidential, but  
12 we're waiving that because this is right off BNSF's  
13 website.

14 A. Right.

15 Q. When you talked in that section we just  
16 referred to in Exhibit 6 about BNSF publishes its train  
17 schedules and makes them available via the Internet, is  
18 Exhibit 25 as far as you can see an example of what one  
19 would find if they went on the Internet?

20 A. I believe so.

21 Q. And what you're suggesting here when you say  
22 the shipper knows the car will take five days to arrive  
23 if it leaves on a Saturday, but only three days to  
24 arrive if it leaves on another day shall we say, there's  
25 no reason the shipper can't size and plan accordingly.

1 How do you think a shipper should take that into  
2 account? For example, should shippers plan to have  
3 their plants produce goods on the days when your transit  
4 times are lower?

5 A. That's one consideration I'd think about.

6 Q. Okay. Well, what else did you mean besides  
7 that by your statement that if the shipper knows the car  
8 will take five days to arrive if it arrives on Saturday,  
9 but only three days to arrive if it leaves on another  
10 day? There's no reason a shipper cannot plan. Did you  
11 mean anything besides that?

12 A. No. That's just one of the variables they  
13 ought to consider in sizing their fleets.

14 Q. Do you believe that your shippers can control  
15 production so that their production coincides with your  
16 best transit time days?

17 A. I don't know.

18 Q. Do you think a shipper should rely on these  
19 types of schedules that appear in your web for planning  
20 purposes?

21 A. I don't see why not.

22 Q. Take a look at the second page if you don't  
23 mind.

24 A. Okay.

25 Q. Where it says, BNSF shipping information is not

1 intended and should not be construed to create any  
2 binding representation and so forth. Nor should it be  
3 relied upon to establish a course of dealing." Then it  
4 says, "Customer understands and agrees that BNSF  
5 shipment information is an estimate of future  
6 performance and not intended as a performance  
7 guarantee." Do you see that?

8 A. Uh-huh, that's correct.

9 Q. Do you think a shipper should believe those  
10 words in deciding whether to rely on these schedules you  
11 put in here now?

12 A. I've said it now three times: I think this is  
13 one factor they need to consider in sizing their fleets.

14 Q. I'm talking about the words I just read to you  
15 from the second page.

16 A. Do I believe what?

17 Q. That the shipper should heed those warnings  
18 that are on the second page of this exhibit?

19 MR. JENKINS: That it's an estimate?

20 THE WITNESS: It's not a warning. It's  
21 just an estimate.

22 Q. (BY MR. GOLDSTEIN) And that it may be affected  
23 by a variety of factors?

24 A. Yeah, may be.

25 Q. Okay. In response to Interrogatory 36, I think

1 you said that BNSF changed its freight schedules  
2 approximately 5,700 times since May of 2001.

3 A. Uh-huh.

4 Q. Can a shipper that is planning to size a fleet  
5 predict when BNSF is going to change its rate schedules  
6 in the future?

7 A. Can they plan for it.

8 Q. Can they predict when they're going to change  
9 their schedules?

10 A. I guess they can't predict.

11 Q. Do they have any control over when BNSF changes  
12 its schedule?

13 A. A lot of shippers do have control by working  
14 with us closely and coordinate it, yes.

15 Q. Are you suggesting that shippers can always  
16 control when BNSF --

17 A. I didn't say always. I said some shippers can  
18 call us and work with us and talk to us about the  
19 importance of the schedule that we have in place. And  
20 if it's going to be changed, they need to have a  
21 dialogue around, why we need to change it and to what  
22 extent we change it.

23 I'll also say one other thing about the  
24 5,700 changes. Those can be -- Those can mean a lot of  
25 different things in terms of what the changes were, was



1 of time a shipper car lease generally covers?

2 A. Oh, they run anywhere from daily use to 20  
3 years. I don't know. And quite frankly, with privates,  
4 I have no idea.

5 Q. If you needed to size a fleet for two years  
6 out, would you rely on today's schedules and the BNSF  
7 web to do that?

8 A. Yeah. Yeah, I would rely on it, and then I  
9 would be communicating with the railroad to tell them  
10 what decisions I'm making based on the schedules so they  
11 were aware of the impact it might have on my fleet size  
12 if you changed it.

13 Q. Not that BNSF would refrain necessarily from  
14 changing its fleet schedules just because it had that  
15 information, right?

16 A. That's right. That's why we don't...

17 Q. What should a shipper do when it's faced with  
18 worsening service on a railroad in terms of sizing a  
19 private fleet? Get more cars, is that one rational  
20 response?

21 A. There's a lot of responses.

22 Q. Is that one rational response?

23 A. I don't know if it's rational or not. I mean,  
24 you're asking these questions --I -- Is it rational, I  
25 don't know.

1 Q. You don't know that it's irrational, do you?

2 A. I don't know what it is. I mean, there's a lot  
3 of things you can do. You can truck it. You cannot  
4 produce. You can shut down. You can produce more. You  
5 can move your plant. You can --

6 Q. If a shipper doesn't want to move his plant,  
7 stop producing --

8 A. Truck.

9 Q. Assuming he can; is that what you're saying?

10 A. I don't know. I'm just -- I'm just throwing  
11 out a bunch of different options. I don't know how to  
12 respond to that question.

13 Q. Are you aware that there are some shippers for  
14 whom rail transportation is basically an essential part  
15 of their distribution system?

16 A. Because of the economics, yeah.

17 Q. Because possibly they have customers who can  
18 only take rail shipments. Have you heard of those  
19 situations?

20 A. It's my belief that -- that -- that -- that the  
21 big shippers ship rail because of the economics, not  
22 because they're -- they're land-locked. I mean, in the  
23 greater scheme of things -- Well, that's all I need to  
24 say.

25 Q. My question is: Are you aware that there are

1 A. That's correct.

2 (Deposition Exhibit Number 27 was marked  
3 for identification.)

4 Q. (BY MR. GOLDSTEIN) This is Exhibit 27, which  
5 is Bates number 000006. It's a rate sheet that was  
6 furnished to us by BNSF. Mr. Langston, if you take a  
7 look at this, is this what you would refer to as a  
8 zero-based rate?

9 A. Yes, I believe it is.

10 Q. And that's because it's a rate and private car  
11 without any mileage payments, correct?

12 A. Uh-huh.

13 Q. And there's no comparable rate shown for  
14 carrier cars to establish a differential?

15 A. Doesn't appear to be.

16 Q. Right. And that's what makes it a zero base  
17 rate?

18 A. No. No, because there's a lack -- It's  
19 zero-based because we've agreed with the customer we're  
20 not going to pay mileage on the car, not because we're  
21 not providing equipment.

22 Q. You're not paying mileage on the car at this  
23 rate, nor are you compensating the customer by allowing  
24 him to use -- to choose between a railroad car rate and  
25 a private car rate, the compensation to the customer in

1 this case is through the rate itself; is that right?

2 A. Uh-huh.

3 Q. So on a zero-based rate what you have done is  
4 compensate the customer by publishing a lower rate in --

5 A. Publishing a different rate --

6 Q. Okay.

7 A. -- to account for the mileage.

8 Q. Right. And you would agree that would normally  
9 be a lower rate than otherwise would apply?

10 A. Yes.

11 Q. Now, I think you said in your discovery  
12 responses that BNSF also provides some allowances to its  
13 customers who perform their own switching. Do you  
14 recall that?

15 A. Yes.

16 Q. And that's a second type of allowance you could  
17 think of. And I gather you weren't able to think of any  
18 others?

19 A. Not off the top of my head.

20 (Deposition Exhibit Number 28 was marked  
21 for identification.)

22 Q. (BY MR. GOLDSTEIN) Exhibit 28, these two pages  
23 are from BNSF's tariff 4022K, and they deal with what's  
24 called an electronic data exchange incentive program.  
25 Do you see that, sir?

1 A. Uh-huh.

2 Q. Are you familiar at all with that program?

3 A. No, I'm not.

4 Q. Okay. If you want to take a second and look at  
5 these two pages, perhaps you can agree with me that what  
6 they represent is a situation where BNSF pays its  
7 customers a per-car fee if those customers prepare the  
8 bill of lading electronically and take care of the  
9 freight bill electronically.

10 A. It doesn't -- I mean -- Yeah, I see that.

11 Q. Okay.

12 A. I don't see where the amount is, but let me say  
13 it a different way. It doesn't surprise me. We do do  
14 these kind of allowances now that you bring this to my  
15 attention.

16 Q. That's all I was trying to get out.

17 A. Yeah.

18 Q. Can you think of any other situations besides  
19 furnishing the freight car, switching and these EDI  
20 situations where BNSF pays allowances to its customers?

21 A. Not offhand.

22 (Interruption in the deposition.)

23 Q. (BY MR. GOLDSTEIN) Let's turn to Exhibit 5,  
24 which is Mr. Langston's first verified statement.

25 A. Okay.

**EXHIBIT NO. 9**

**REDACTED**

**Langston, Douglas W**

**From:** Bender, Garrick  
**Sent:** Tuesday, February 20, 2001 9:20 AM  
**To:** Langston, Douglas W  
**Cc:** Lieb, Merrill G; Nunez, Juan R; Crossley, Linda L; Duggan, George T; Steele, Ethel A; Graham, Kenneth I; Schmidt, R Mark  
**Subject:** RE: Private Car Policy changes customer behavior POSITIVELY

Doug,

See note from Linda Crossley below. Her customer, [REDACTED] is taking a win-win approach to the new private car policy. They will add storage tracks inside their plant, an initiative which has been in limbo for years.

The action is positive for multiple reasons:

1. Locks up business w/BNSF for multiple years in exchange for incentives.
2. Simplifies BNSF operating service to plant.
3. Relieves tank car congestion on BNSF outside plant.
4. Customer avoids lease cost.
5. Customer avoids intra-terminal switch.
6. Customer inventory is 'on-hand' inside their plant.

Linda - Will San Joaquin perform own switching inside plant.

This initiative has been extremely successful at [REDACTED] for several years. BNSF delivers empties and pull loads only. Safety concerns have dropped precipitously. All storage and switching is performed by third party switching inside the facility. There is no need to store cars on BNSF. We have saved operating dollars as well as cleared a highly congested yard. Best of all, [REDACTED] is our partner on a long-term basis.

THIS IS THE TYPE OF POSITIVE BEHAVIOR WE ANTICIPATE AND ENCOURAGE WITH THE NEW POLICY.

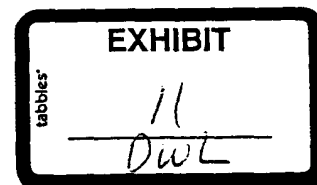
Thanks,

*Garry Bender*

BNSF  
410-539-2450  
410-539-3012 FAX

—Original Message—

**From:** Crossley, Linda L  
**Sent:** Friday, February 16, 2001 6:15 PM  
**To:** Duggan, George T  
**Cc:** Bender, Garrick; Lieb, Merrill G; Nunez, Juan R  
**Subject:** Demurrage Changes Etc.



I just thought I would throw a positive note out there on this one since everything has been negative feedback. I shared this briefly on our Petroleum conference call this morning for Gary's sake so he could have something good to feed back to upper management on this issue. Just like the [REDACTED] deal, this is forcing them to build the storage tracks, etc. they have been putting off doing for years. Then, we walk in, offer to help through allowances, which initially totally reimburses them for their costs, but - the big thing we get is long-term contracts. If we tie up competitive business at high margins for long years say 5+, and after the first year which we loose somewhat on it because that allowance is coming right off the top - sorta like interest rates on your car, the end result is seized business for the next 4, or hopefully in the case of [REDACTED], 6 years (that is long-haul and competitive). Now, I don't fret about every contract coming back up with the UP etc. Not that I'm afraid of negotiations, this frees me up to concentrate my efforts on new business - the truck business or the business moving adverse somewhere else. I think if our field people could approach some of their customers in this manner (some of course will tell us to take a hike - but many will listen), we will seize business long term and watch our bottom line growing like crazy because we're now free to go after other stuff. Now, this is Linda Crossley thinking out of the box, but thought I'd just throw it out there for you guys. My thought for the day. Have a good holiday. LC

### Cars On-Line, Train Velocity, Terminal Dwell Time, and On-Time Performance

	Jan-00	Feb-00	Mar-00	Apr-00	May-00	Jun-00	Jul-00	Aug-00	Sep-00	Oct-00	Nov-00	Dec-00
Cars On-Line	203,937	204,645	206,865	205,709	201,779	203,131	204,701	204,357	206,490	207,331	207,235	206,704
Train Velocity	26.4	27.0	26.7	27.0	26.2	25.8	25.5	25.5	25.8	25.1	24.5	24.7
Terminal Dwell Time - Old	24	24	25	24	24	26	25	25	26	27	27	30
Terminal Dwell Time - New	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
On-Time Performance	92.9%	91.8%	92.0%	91.4%	91.0%	86.7%	87.1%	86.3%	90.1%	85.2%	82.6%	87.3%

	Jan-01	Feb-01	Mar-01	Apr-01	May-01	Jun-01	Jul-01	Aug-01	Sep-01	Oct-01	Nov-01	Dec-01
Cars On-Line	202,934	208,210	206,242	205,004	204,401	206,017	204,462	206,578	204,340	203,143	201,672	201,239
Train Velocity	25.8	24.5	25.1	24.3	24.1	24.1	24.3	24.0	24.7	24.6	25.0	25.2
Terminal Dwell Time - Old	27	27	26	26	26	26	26	26	26	26	26	28
Terminal Dwell Time - New	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
On-Time Performance	90.3%	85.7%	89.5%	88.3%	88.9%	85.7%	88.7%	85.5%	89.8%	88.6%	92.6%	92.7%

	Jan-02	Feb-02	Mar-02	Apr-02	May-02	Jun-02	Jul-02	Aug-02	Sep-02	Oct-02	Nov-02	Dec-02
Cars On-Line	197,515	195,141	193,510	191,657	191,922	191,871	195,595	194,900	192,075	190,805	191,479	187,598
Train Velocity	26.1	26.2	26.4	26.4	25.7	25.3	25.2	25.3	25.6	25.7	25.7	26.3
Terminal Dwell Time - Old	25	26	26	26	26	27	27	26	26	27	28	29
Terminal Dwell Time - New	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
On-Time Performance	95.2%	92.2%	92.0%	91.6%	92.0%	90.4%	91.2%	90.7%	91.7%	92.3%	91.1%	93.7%

	Jan-03	Feb-03	Mar-03	Apr-03	May-03	Jun-03	Jul-03	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03
Cars On-Line	187,916	189,531	191,526	191,302	190,859	191,453	193,191	195,770	195,983	196,734	196,392	193,868
Train Velocity	26.2	25.5	24.8	25.1	25.1	24.8	24.3	24.3	24.8	24.2	23.7	24.6
Terminal Dwell Time - Old	28	29	29	28	29	30	30	30	29	28	29	29
Terminal Dwell Time - New	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
On-Time Performance	92.1%	88.5%	85.9%	87.6%	90.5%	88.9%	88.8%	86.5%	88.7%	85.4%	83.5%	89.9%

	Jan-04	Feb-04	Mar-04	Apr-04	May-04	Jun-04	Jul-04	Aug-04	Sep-04	Oct-04	Nov-04	Dec-04
<b>Cars On-Line</b>	193,081	193,954	195,543	199,565	203,909	204,359	203,422	203,827	201,859	200,066	199,100	199,064
<b>Train Velocity</b>	26.8	26.4	26.1	25.8	25.0	24.7	24.4	24.5	25.3	25.3	24.9	24.2
<b>Terminal Dwell Time - Old</b>	29	30	29	29	32	32	31	30	29	29	28	29
<b>Terminal Dwell Time - New</b>	9.8	9.9	9.7	9.6	10.3	10.3	10.2	9.8	9.5	9.4	9.4	9.5
<b>On-Time Performance</b>	90.4%	84.0%	83.1%	83.8%	78.2%	76.1%	80.0%	77.8%	82.7%	81.6%	81.9%	84.3%

[illegible]

**Notes:**

**Notes:**  
 "Terminal Dwell Time - Old" is a simple average of the 11 stations BNSF reports individually as a true system figure was not reported.  
 "Terminal Dwell New" includes all cars (old method did not include intermodal and coal). Also included in new method are cars on run-through trains (old method only counted cars that switched trains at a terminal)

**BNSF 010794**

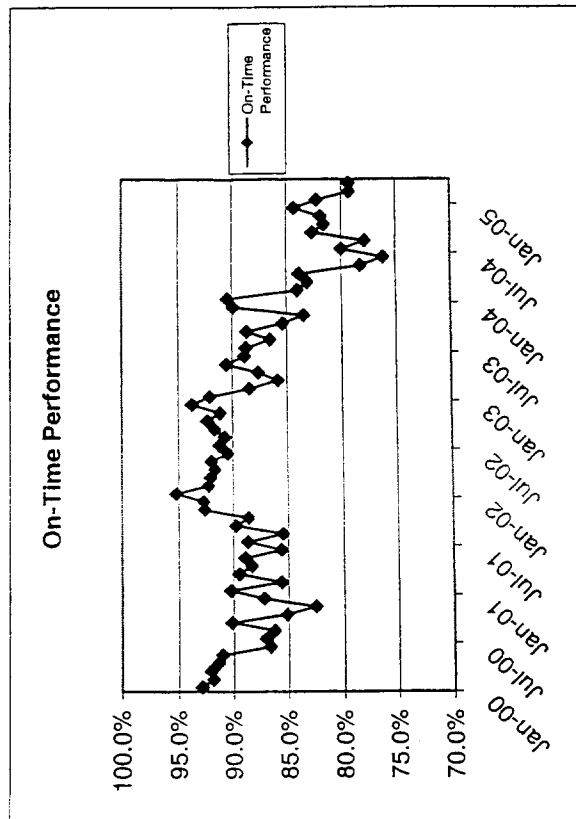
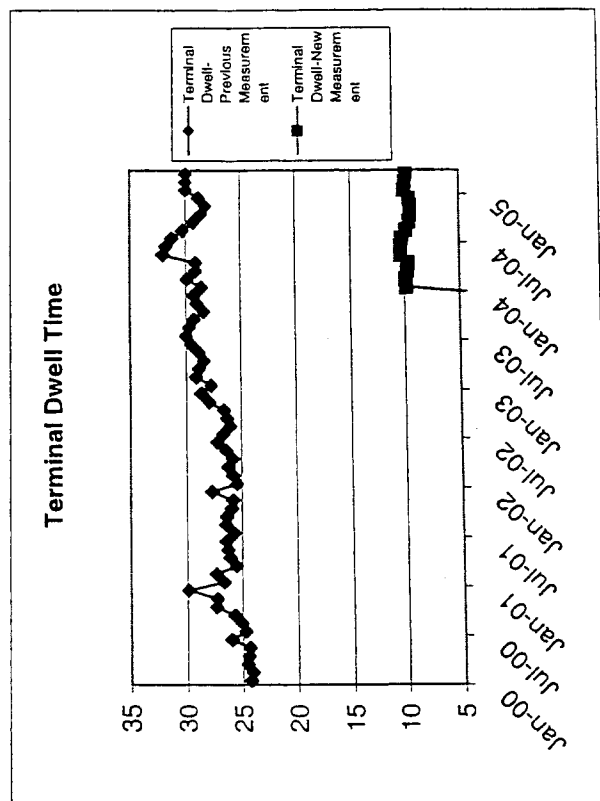
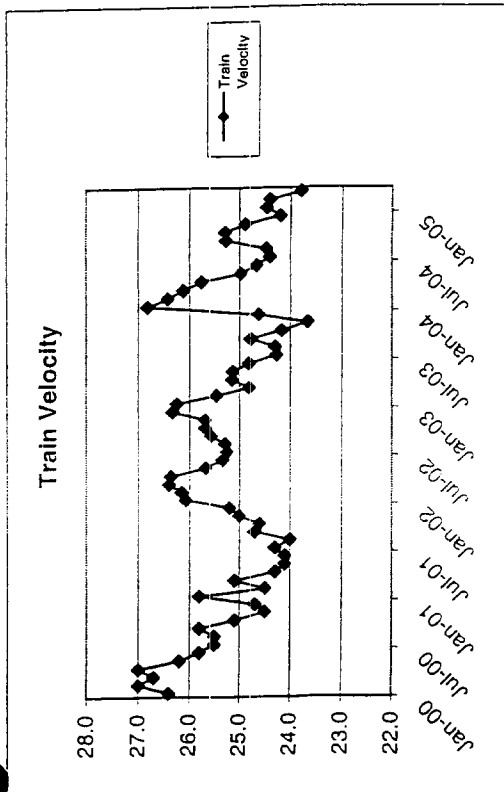
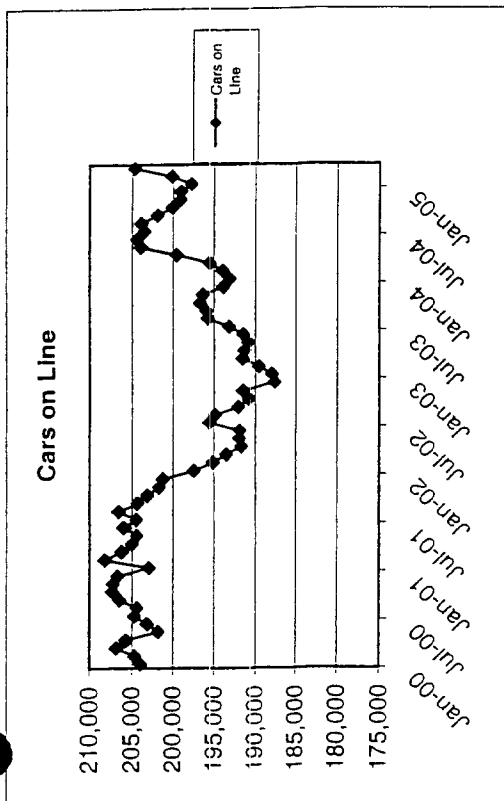
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**EXHIBIT**

**Abstract:**

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## BNSF AAR Performance Measure Definitions

### Average Train Speed

Date Last Modified - 15-Feb-05

Average Train Speed, stated in miles per hour, is calculated by dividing train-miles by hours operated. This measurement covers the line-of-road portion of the trip from terminal to terminal, and excludes terminal dwell time. System-wide average train speeds are given for train types of intermodal, manifest (which includes automotive parts moving in box cars), multilevel, coal unit trains, grain unit trains, and total system. Trains not included in individual train measurements (e.g. Unit Rock Trains) are included in total system speeds, but not in an individual category.

### Average Terminal Dwell Time

Date Last Modified - 15-Feb-05

Average Terminal Dwell Time is the average time a car spends within an operating yard from arrival to departure. The time for cars in customer responsibility, constructive placement, bad order, and stored status is excluded from the dwell measure. Maintenance of way cars are generally excluded from the calculation. The "Entire Railroad" figure includes dwell time at all major terminals -- not just those terminals BNSF reports individually.

### On-Time Performance

For non-intermodal equipment besides coal, the measurement cycle starts with the release or receipt in interchange and ends with the actual placement or interchange delivery offline. Actual performance is measured against the service scheduling trip plan goal which is set at the beginning of the trip.

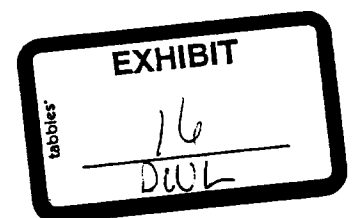
For coal, the measurement is a full cycle from mine to utility back to mine. This includes both the loaded and empty trip of the coal cars. The performance is measured against goals established at the beginning of the year for total system cycle time.

For intermodal equipment, the measurement cycle starts with an ingate or receipt in interchange and ends with a deramp or interchange delivery offline. Actual performance is measured against the service scheduling trip plan goal which is set at the beginning of the trip.

**EXHIBIT NO. 14**

**REDACTED**

Year	Main 1	Main 2	Other Main	Sidings & Crossovers	Way Switching	Yard Switching	Total	
2000	193	16	0	7	1	4	221	Miles added
2000	-79	0	0	-5	-26	-17	-127	Miles retired
2000	24,999	4,296	160	3,291	2,794	5,975	41,515	94 Year-end mileage
2001	0	0	0	10	1	20	31	Miles added
2001	-304	0	0	-11	-30	-38	-383	Miles retired
2001	24,695	4,296	160	3,290	2,765	5,957	41,163	-352 Year-end mileage
2002	4	6	0	3	6	42	61	Miles added
2002	-124	0	0	0	-15	-89	-228	Miles retired
2002	24,575	4,302	160	3,293	2,756	5,910	40,996	-167 Year-end mileage
2003	59	55	0	4	6	4	128	Miles added
2003	-338	0	0	-2	-69	-10	-419	Miles retired
2003	24,296	4,357	160	3,295	2,693	5,904	40,705	-291 Year-end mileage
2004	0	46	15	3	18	5	87	Miles added
2004	-812	0	0	-52	-186	-43	-1,093	Miles retired
2004	23,484	4,403	175	3,246	2,525	5,866	39,699	-1,006 Year-end mileage



BNSF 014213

**EXHIBIT NO. 21**

**REDACTED**

## SUPPLEMENT 8 TO TARIFF RIC 6007-L

### SECTION 1 EXCEPTIONS TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS

#### ▲ ITEM 73-A

##### BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (EXCEPTION TO ITEM 190)

1. When a tank car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:

Burlington Northern & Santa Fe Railway Co.

Carload Billing

920 S.E. Quincy

Tokepa, KS 66612

Telephone: (800) 786-2873

FAX: (800) 786-2455

prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

EXHIBIT

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## SUPPLEMENT 8 TO TARIFF RIC 6007-L

### SECTION 2 EXCEPTIONS TO APPLICATION AND RULES APPLIES ON CARS OTHER THAN TANK CARS

#### ▲ ITEM 428-A

##### BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (EXCEPTION TO ITEM 615, PART B)

1. When a car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:

Burlington Northern & Santa Fe Railway Co.  
Carload Billing  
920 S.E. Quincy  
Tokepa, KS 66612  
Telephone: (800) 786-2873  
FAX: (800) 786-2455

prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

#### ▲ ITEM 430-A

##### BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (EXCEPTION TO ITEM 615, PART C)

1. When a car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:

Burlington Northern & Santa Fe Railway Co.  
Carload Billing  
920 S.E. Quincy  
Tokepa, KS 66612  
Telephone: (800) 786-2873  
FAX: (800) 786-2455

prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

#### EXPLANATION OF REFERENCE MARKS

- ▲ Denotes change in wording which results in neither increase nor reduction in charges.

(RIC 8)

BNSF 014320

## SECTION VIII

### Specifications for Pool Header and Car Assignments

From Pool Number--1) Input seven-digit code identifying pool assignment from which car is being removed. If the car is presently unassigned, input zeros. (Not applicable to UMLER On-line Application)

To Pool Number--input seven-digit code identifying the pool assignment to which the car is being added. If the car is to be shown as unassigned, input zeros.

Alphabetic reporting mark of the pool operator or designated pool reporter reporting the car assignments to the UMLER file.

Passkey is the confidential code assigned to pool operator or designator pool reporter.

#### ITEM E

#### Transportation Code Specifications Applicable to Assignable Cars

C--Railroad car assigned to a specific shipper at a specific location. Equipment covered under the provisions of CSD 145, 155 and 435. Must be a "C" type pool.

D--Railroad car that has not been on home road or private car that has not been loaded as evidenced by TRAIN-records. (See Item I).

G--Cars used for loading of contaminated commodities as provided in Car Service Rule 14. Pool Code number may be blank. If pool Code number is not blank, pool must be a G type pool.

J--Car restricted to an Agent's Pool. Must be "J" type pool. Cars are covered under the provisions of CSD 145. (See Exception 1. to CSD 145).

N--National Pool car assigned to a specific shipper but not to a specific point. Must be a "N" type pool. If railroad car, must be covered under the provisions of CSD 145, or 435.

P--Car restricted to a Commodity Pool. Must be a "P" type pool. If railroad cars, must be covered under the provisions of CSD 145, 155 or 435.

R--Car restricted to an Agent's Pool. Must be "T" type pool. If railroad cars, must be covered under the provisions of CSD 145, 155 or 435.

U--Unassigned railroad car to be handled in accordance with the applicable provisions CSD 150, 155.

W--Unassigned railroad car to be handled in accordance with the applicable provisions of CSD 435, and private covered hopper registered (Data No. 8, Section I), as leased to a railroad.

X--Overage (XA) cars assignable to all pool types, except N--National Pool.

--Unassigned railroad cars to be handled in accordance with applicable provisions of CSD 150.

#### ITEM F

#### Mechanical Designations Qualified to Directive/Orders

Mechanical Designations and Corresponding Equipment Type Codes For Equipment Carrying Railroad Reporting Marks and Private Reporting Marks Leased To A Railroad Covered Under Provisions of CRD-98, CSD 145, 150, 155, 175 and 435, and SCO-90.

Provision	Mechanical Designation	Equipment Type Codes	Mechanical Designation	Equipment Type Codes
CSD 145, 150	XL	A_3_	HMS	K_2_
	XLJ	A_4_	HMSR	K_7_
	XM	B_0-6_	HTR	K_30
	XMJ	B_7-8_	HTS	K_4_
	XP	A_0_	FA	V_
	XPJ	A_1_	FB	F_4_
	RB	R_0_	FBS	F_5_
	RBL	R_1_	FC	P_
	RC	R_9_	FCA	O_
	RP	R_6_	FCA	S_
	RPL	R_7_	FD	F_3_
	GB	G_1-4_	FDC	F_9_
	GBR	E_2_	FL	F_7_
	GBS	E_3_	FM	F_0_
	GBSR	E_4_	FMS	F_1_
	GD	G_5_	FMS	F_2_
	GDS	E_9_	FBC	F_8_
	GS	G_8_	FW	F_6_
	GSS	E_6_	LF	L_0_
	GTR	E_1_	LG	L_1_
	GTS	E_0_	LP	L_2_
	GWS	E_8_	LPS	L_3_
	GWSR	E_9_	LU	L_4_
	HKR	K_5_	LM	L_6_
	HKS	K_0_	LC	L_7_
	HWA	K_6_	LS	L_9_
CSD 155	XF	A_2_		
CSD 175	All Cars with Transportation Code C			
CSD 435	LO	C_1_		
	HTR	C_2_		

Provision	Mechanical Designation	Equipment Type Codes	Mechanical Designation	Equipment Type Codes
SCO-90	FB	F_4_	LC	L_7_
	FBC	F_8_	LG	L_1_
	FBS	F_5_	LU	L_4_
	FC	P_	RB	R_0_
	FCA	O_	RBL	R_1_
	FCA	S_	RPL	R_7_
	FDC	F_9_	XF	A_2_
	FL	F_7_	XL	A_3_
	FM	F_0_	XLJ	A_4_
	FMS	F_1_ F_2_	XM	B_0-6_
	GB	G_1-4_	XMJ	B_7-8_
	GD	G_5_	XP	A_0_
	GS	G_8_	XPJ	A_1_
	GBR	E_2_		
	GBS	E_3_		
	GBSR	E_4_		
	GSS	E_6_		
	GWS	E_8_		
CRD-98	HFA	H_2_		
	HK	H_3_		
	HM	H_4_		
	HT	H_5_		
	HTA	H_6_		

#### ITEM G

#### UMLER On-line Users Manual

1. Users Reporting Requirements for Creating, Changing, or Deleting a Pool (Pool Header Master). Only the pool operator may establish, change or delete a pool. The pool operators Passkey as assigned by the Director, UMLER Services, RAILINC must be reported with each transaction.

a. Establishing a New Pool. All pool operators must report as specified in Item B. RAILINC will process pool operator's transaction and provide the pool operator with the applicable UMLER message 75 (valid transaction) or message 76 (error transaction). (See Item A--Glossary).

b. Changing an Established Pool. The pool operator must report the Pool Header transaction, which is used for changing the following: shipper or patron name, state, loading station, pool operator(s), pool type, pool location, maintenance pool codes and/or designated pool reporter(s). The pool number cannot be changed unless a delete is being effected. RAILINC will process pool operators' transaction, and provide pool operators with the



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET No. 42060**

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY**

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**VERIFIED STATEMENT OF DOUGLAS W. LANGSTON**

My name is Douglas W. Langston. I am a General Director for The Burlington Northern and Santa Fe Railway Company with 13 years of experience in the railroad industry. I began my career with the former Burlington Northern Railroad performing pricing activities for various Industrial Commodity Segments. In 1993, I was promoted to Manager of Pricing for Chemicals and Plastics, where I was involved in the pricing activities for plastics and other, related, chemical commodities. In 1995, I was appointed Sales Manager for BNSF, where I was involved in various sales and day to day operational issues impacting our customers. In 1998, I was appointed to the position of Director Equipment Utilization at our headquarters in Ft. Worth, Texas. In this capacity, I assumed various roles managing fleets of equipment such as Gondolas, Flats, Covered Hoppers, Open Top Hoppers, and Refrigerated Boxcars. I was also responsible for any issues (expense, inventory reporting, claims handling, pool management, etc.) relating to private equipment. In this capacity, I became directly involved in the review and development of BNSF's Private Equipment Policy. I have also been involved in all negotiations pertaining to settlements, contracts, and other customer or commercially related activities concerning

Demurrage, Private Storage, and other Miscellaneous charges. In 2002, I was appointed to the position of General Director Demurrage & Miscellaneous Charges. This includes Demurrage, Private Car Storage, Switching, and Diversions. I now manage a group responsible for the development and enforcement of policies to support improvements in asset utilization and billing for ancillary charges on BNSF. We also work to educate both our internal and external customers on the policies, their application, and how they can help manage through these policies. I received a B.S. in Biological Sciences from Texas A&M University and an MBA in Finance & Marketing from Texas Christian University.

The purpose of my statement is to respond to certain questions posed by the Board in its April 28, 2003 decision in Docket No. 42060.

**I. Overview of BNSF's Private Car Storage Charge Policy**

**A. Purpose of the policy**

The number of empty private cars being stored on BNSF's system at any given time directly affects BNSF's ability to provide efficient service. Such cars consume valuable track capacity, increase system congestion, and can make it more difficult for BNSF to serve its customers efficiently. Prior to the adoption of its Private Car Storage Tariff, BNSF had an excessive number of empty private cars sitting on its tracks for extended periods of time. For example, on April 30, 2001, there were 2,686 empty private cars sitting on BNSF's tracks, taking up over 31 miles of BNSF's track space. These cars had been sitting on BNSF's track at the same location for more than 30 days. A total of 1,572 of these empty private cars had been sitting on BNSF's tracks for over 100 days.

The congestion caused by these empty private cars was hampering BNSF's ability to build trains efficiently and to readily move them through its yards. BNSF was regularly forced to move empty cars around its yards and, in some cases, even between yards in order to free up

space to prepare blocks of cars for its linehaul trains.<sup>1</sup> BNSF was also forced to stop empty private cars short of their final destination and store them at intermediate points between the cars' origin and destination because there was no room for them in the Houston yard. Such additional movements unnecessarily increased the amount of time needed to prepare BNSF's line haul trains and forced BNSF to incur additional expense moving them around.<sup>2</sup>

The situation BNSF was experiencing in its yards with the large numbers of empty private cars was similar to what happens to the flow of traffic on a road when cars are parked illegally in a lane reserved for rush hour traffic. In such a situation traffic comes to a halt when it encounters the parked car and the traffic in that lane must move over to the next lane before it can continue forward. The net effect is a reduction in the flow of all the traffic as the traffic in the free lane must slow down to allow traffic from the other lane to enter. The situation is compounded on the rail system because trains run on rails and cannot simply move over to the

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<sup>1</sup> At times, for example, BNSF was forced to move trains of empty cars back and forth from its yard in Houston, Texas to its yards in Brownwood and Fort Worth, Texas to create space in its Houston yard. Once, BNSF even had to move empty cars back and forth from Houston to Saint Louis, Missouri, to free up track space in its Houston yard.

<sup>2</sup> Like other railroads, BNSF builds a train by putting groups of cars together that are moving in the same direction. Such groups are referred to as "blocks." Separate tracks are needed to build each block. For example, BNSF may build a line haul train in Houston, Texas that is traveling to Seattle, Washington, and will be making stops in Denver, Colorado, and Pasco, Washington, on its way. BNSF will combine all of the cars heading to Denver in one block, the cars heading to Salt Lake City in another block, and the cars heading to Pasco in a third block. When the train arrives in Denver, BNSF will switch out the block of cars destined for Denver and may pick up a block of cars headed for Seattle. The train will then continue on to Pasco where BNSF will switch out the block destined for Pasco before moving on to Seattle.

"Blocking" cars in this way enables BNSF to more easily switch out all of the cars heading in the same direction, thereby reducing trains' dwell times (the amount of time trains sit in a yard). This method is far more efficient than switching individual cars out of the train one at a time.

next lane of tracks. Instead they must first be moved to an area where they can be switched onto a separate track. I note that it only takes one car to slow down the flow of traffic.

As the level of congestion caused by the empty private cars stored on BNSF's system grew, BNSF realized it would have to do something to encourage shippers to stop using BNSF's track as a parking lot and to keep their cars moving efficiently through the rail system. BNSF and other railroads have long used demurrage and storage charges to encourage the efficient utilization of loaded and empty railroad owned cars and loaded private cars, to encourage the efficient movement of cars and to recover some of the costs associated with holding cars on their tracks. As a general matter, such charges have been fairly successful at encouraging shippers to keep loaded private and loaded and empty railroad owned and controlled cars moving. BNSF already assessed demurrage charges on loaded private cars that were left on BNSF's track for more than a two day period, and we decided that a similar program for empty private cars was needed. BNSF designed a private car storage policy to encourage shippers to keep their cars moving and to help BNSF recover the costs associated with storing the empty cars on its tracks.

BNSF implemented its new private car storage policy on July 1, 2001. Nearly two years later, it is clear that BNSF's private car storage policy is working. As shown by the attached charts, the total average amount of time all empty private cars spend on BNSF's track before being moved has declined dramatically since BNSF adopted its private car storage policy. Exhibits A and B show the average amount of time that all industrial and agricultural private cars have sat empty on BNSF's track before being moved by the shipper.<sup>3</sup> The charts clearly show that the average time that all industrial and agricultural private cars are left on BNSF's tracks has

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<sup>3</sup> I use the term "industrial" cars to refer here to all private cars other than private agricultural cars.

declined by approximately one full day since the storage policy was first adopted. See Exhibits A and B, attached. In May 2001, empty industrial private cars sat on BNSF's tracks for an average of two days after constructive placement; in May 2003, the average was one-half of a day. See Exhibit A. Empty agricultural private cars sat on BNSF's track for an average of one and one-third days in May 2001; the average was one-third of a day in May 2003. See Exhibit B. Moreover, since the policy was first adopted, the number of empty private cars, including both private tank cars and private covered hoppers, being left on BNSF's track has decreased significantly. On April 30, 2001, shortly before BNSF adopted its private car storage policy, BNSF had 2,686 empty private cars that had been left on its system for more than 30 days. By May 7, 2003, the number of empty private cars being left on BNSF's tracks more than 30 days had decreased substantially, to 991 – a reduction of more than 60 percent in the number of empty cars being held on BNSF's tracks. At the same time the number of empty private cars being stored on BNSF's track was decreasing, BNSF's traffic volume was increasing. BNSF is handling more business with fewer cars. As a result, BNSF's track is less congested than it was nearly two years ago and its ability to provide efficient service to its customers has improved.

The reason for this dramatic reduction is that a significant number of shippers responded to BNSF's new private car storage policy by moving their empty private cars off of BNSF's track to avoid the payment of storage charges. Some moved cars off the system, others elected to hold cars inside their facilities or move them more quickly through their facilities, and others chose to lease track space to store their empty cars when the cars are not in use. BNSF has entered into a number of track space lease agreements with shippers since the policy was implemented. These shippers use the leased track space to store their empty private cars when the cars are not needed. Other shippers have, with BNSF's assistance, built track within their

facility to store their empty private cars. In fact one of NAFCA's individually named complainants built its own private car storage track in exchange for BNSF waiving its storage charges. Still other shippers have used existing track in their facilities to store their empty private cars. As a result of such shipper actions, there are fewer private cars sitting empty on BNSF's system today and the system is less congested now than it was nearly two years ago before the private car storage policy was implemented, which benefits both BNSF and its customers.

The decrease in congestion has enabled BNSF to be more efficient in its operations. BNSF has seen an increase in the number of loaded miles its trains move each day and an improvement in its overall level of on-time performance. While the improvements BNSF has experienced regarding loaded car miles per day and on-time performance are due to a variety of factors, it is clear that the reduction in empty private cars sitting on BNSF's tracks has contributed to these service improvements. In addition, BNSF has seen an overall level of improvement in private car utilization, which benefits both BNSF and its customers.

#### **B. Specifics of the Policy**

On July 1, 2001, BNSF amended its policies regarding storage and demurrage charges for empty and loaded private cars, including private tank, grain and sugar cars, held on BNSF tracks. See BNSF Private Car Storage Book 6005 and BNSF Demurrage Book 6004-A.<sup>4</sup> BNSF added a \$25 per day storage charge for empty private equipment (with the exception of empty private

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<sup>4</sup> BNSF shared information on its new private car storage policy on numerous occasions well before its proposed effective date. BNSF had originally intended to make its new storage policy effective on May 1, 2001. BNSF postponed the effective date of the new policy to July 1, 2001 at the request of several shippers and shipper organizations who wanted additional time to respond to the new policy.

grain and sugar cars) held on BNSF track beyond a two-day free period. As with other charges, these storage charges provide that shippers begin to accrue charges on the second 12:01 a.m. – excluding the first Saturday, Sunday, or Holiday when computing to the second 12:01 am. The practical effect of this provision is that a shipper may have as much as four full days and 23 hours and 59 minutes of free time (including weekends), or as little as 24 hours and one minute of free time to request the car to spot, depending on when the car was constructively placed.<sup>5</sup>

Prior to these revisions, with the exception of covered hopper cars used to transport grain, grain products, and sugar (“grain and sugar cars”), BNSF assessed demurrage charges of \$75 per day on loaded private and loaded or constructively placed empty railroad cars held on BNSF track. *See* BNSF Demurrage Book 6004-A. Loaded private grain and sugar cars and loaded or constructively placed empty railroad grain and sugar cars held on BNSF track were assessed a nonpeak season demurrage charge of \$25 per day.

In addition to adopting a new private storage policy, BNSF revised its Diversion Book to assess a charge of \$150 per car, up to a total of \$450 for a block a cars, for diverting empty private cars where the diversion involves a change in destination or routing. BNSF also amended its diversion book to assess a charge of \$150 per bill of lading for a change in the consignor, consignee, weighing instructions, and cancellation of shipping instructions.

Diversions occur after a empty private car has been released to BNSF’s custody. *See* Item

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<sup>5</sup> Pursuant to the new private car storage policy, BNSF reduced its charge for holding loaded private equipment (with the exception of loaded private grain and sugar cars) on its track beyond a two-day free period from \$75 to \$25 per day. *See* BNSF Private Car Storage Book 6005. In response to the request of shippers and private car owners, BNSF later increased the charge back up to \$75 per day. The shippers and private car owners were concerned that a charge of \$25 per day would not provide receivers with enough of an incentive to unload their private cars quickly.

1000B, BNSF Diversion Book 6200-A. Prior to this revision, BNSF did not charge for the diversion of empty private cars.

BNSF has made several changes to its private car storage tariff since its initial adoption. These changes are intended to fine tune BNSF's storage policy and were made specifically to respond to concerns raised by shippers and private tank car owners. BNSF's revised storage policy has been carefully tailored to encourage shippers not to leave their empty cars on BNSF's tracks for long periods of time, particularly in areas experiencing the most congestion on BNSF's system. Specifically, in April 2002, BNSF established a three-tier rate structure for storage charges where the rate charged is dependent on both geography and operational constraints. Under the revised storage policy, empty private cars stored beyond the second 12:01 am on BNSF's track are assessed a charge of \$25 per day in areas where track congestion is most likely, a charge of \$15 per day in areas where congestion is likely, and a charge of \$10 per day in areas where congestion is least likely. See Item 1800B, BNSF Private Car Storage Book 6005.

BNSF also revised its storage tariff to provide one extra credit day for empty private cars that are loaded and shipped via a BNSF revenue line-haul move. See Item 1700, BNSF Private Car Storage Book 6005. BNSF's new storage policy also provides relief for bunching caused by BNSF.

In response to the concerns of private car owners, BNSF reinstated its \$75 per day storage charge for loaded private equipment. See Item 1700, BNSF Private Car Storage Book 6005. In addition to the changes to its private car storage policy, BNSF also revised its Diversion Book to provide shippers with one free diversion on empty private cars, where the destination, routing, consignee, or consignor is changed and BNSF revised its Rules Book to waive the \$300 intra-terminal switch charge for cars ordered, placed, and subsequently cancelled



(except for grain and grain products). See BNSF Diversion Book 6200-A, and Item 3000A, BNSF Rules Book 6100-A.

## **II. Length of Time and Track Used To Hold Empty Private Cars Varies**

I understand that the Board has asked for information concerning the amount of time a private empty car is typically held on BNSF's tracks and the length of track that is typically used to hold such cars. See April 28, 2003 Decision at 4. As a general matter, there is no typical amount of time a private car owner stores its car on BNSF's track before loading the car. Nor is there any typical length of track that is occupied by empty private cars stored on BNSF's tracks. The actual amount of time a private car sits empty on BNSF's tracks varies greatly among shippers and is greatly influenced by shipper's business decisions.

Some private car owners have never or rarely left their empty private cars on BNSF tracks to be stored. Other private car owners routinely used BNSF's track as their own personal parking lot before BNSF adopted its new private car storage policy. For example, several plastics shippers routinely left their private cars sitting empty on BNSF's tracks for well over 30 days at a time before the implementation of BNSF private car storage policy. While the situation has greatly improved since the adoption of BNSF's private car storage policy, there are still a significant number of private cars owners that routinely leave their empty tank cars sitting on BNSF's tracks for more than 30 days at a time. Still other private car owners allow their cars to sit empty on BNSF's track for more than 100 days at a time. For example, one of our customers in Kansas City, Kansas routinely allows its empty cars to sit on BNSF's track for more than 30 days at a time. Another BNSF customer in Hutchinson, Kansas has left twelve of its empty cars sitting on BNSF's tracks for well over a year when it has space within its plant to store the empty cars on its own track.

The length of BNSF track taken up by empty private cars also varies greatly depending on the private car owner. The length of track used to store empty private cars is directly related to the number of empty private cars held. Thus, the length of track taken up by private empty cars varies greatly depending on the shipper. For example, the twelve empty cars left for over 100 days on BNSF's track by the shipper in Hutchinson, Kansas took up over 720 feet of BNSF's track, more than one-tenth of a mile. In contrast, a shipper that leaves two cars on BNSF's tracks takes up 120 feet of BNSF's track.

The number of private empty cars being stored on BNSF's tracks has forced BNSF in the past to lease track from shortlines and private rail yard owners. For example, BNSF leased track from Port Terminal Railroad Association (PTRA), a shortline in Houston, Texas. BNSF currently leases track from the Louisiana Delta Railroad, Lafayette, Louisiana.

### **III. Furnishing of Holding Tracks for Storing Private Cars Is Not Part of BNSF's Line-Haul Service Covered by BNSF's Line-Haul Rates**

#### **A. BNSF's Policy and Practice Under Deregulation Has Been to Set Different Prices for Different Services or Components of Services, Both to Encourage Efficient Operations and to Avoid Cross-Subsidization**

Setting a single "bundled" price for every level of service encourages inefficiency. Just as "unbundling" charges for water and electrical services from apartment rental charges discourages tenants from wasting water and electricity, so too does "unbundling" charges for different components of a railroad's services encourage customers to make use only of those components for which they are willing to pay. The issue is not whether that component constitutes an independent service – water and electrical services may or may not be considered integral to apartment rental – but whether separate charges for different components will encourage more efficient utilization of the services offered.

Where railroads are concerned, the case for unbundled prices that require customers to consider the costs of the services they desire is particularly strong, because the result of customers not being required to "internalize" those costs can be gridlock. There was a time, for example, when most rail traffic in this country moved under single-car rates that provided no incentive for shippers to pre-block their traffic and thereby limit the amount of industrial switching and railroad yard work required to serve them. The result was congested yards, excessive switching, and unprofitable rail operations. By setting lower rates for multi-car shipments and higher rates for single-car shipments, railroads required shippers to recognize the high rail operating and infrastructure costs imposed by single-car shipments. Shippers increasingly opted to organize their own operations and invest in plant infrastructure to pre-block their shipments to qualify for multi-car rates, which reduced the amount of switching required to serve them, freed up yard space, and improved the railroads' financial performance.

The general move by the railroads to differential pricing for different levels of service did not go unopposed by some shippers. In the case of single-car versus multi-car rates, for example, shippers that did not want to change the way they did business complained that lower rates for multi-car shipments were "discriminatory" and "unfair." Over time, however, shippers began to see the benefit of such efficiency-enhancing rate differentiation, as congestion eased and service improved. Those that were willing to make the effort to incur the expenditures required to qualify for the multi-car rates began to see rate differentiation as a positive development, and had no interest in returning to the "one-size-fits-all" approach that would require them to cross-subsidize single-car shippers.

Similarly, when railroads first began charging separately for holding loaded private cars while shippers decided where they wanted those cars to be shipped, some who had grown used to

paying nothing extra for railroads to hold their loaded cars complained vigorously. Although yards and sidings were often full of such cars, they asserted that railroads had always been willing to hold their cars as part of the railroads' line-haul service, and that the costs of holding those cars was included in the line-haul charge. The short answer to this was that times had changed. Railroads were no longer willing, nor able, to allow shippers to use the railroads' tracks to hold their loaded cars without paying for it. They simply could not continue to provide this service for free and operate efficiently. They no longer held themselves out to provide this service for no extra charge, and the line-haul service no longer could be viewed as encompassing storage of loaded cars. Shippers initially complained about the new policy and argued that the railroad had previously held their cars as part of their line-haul service. The shippers, not surprisingly, eventually began to provide shipping instructions much more quickly or to make arrangements for holding loaded private cars on their own track or on rented track. Here again, over time, the shippers and car owners themselves began to see the benefit of the incentive for efficient car utilization provided by BNSF's and other railroads' separate charges for holding loaded private cars. In fact, when BNSF lowered its charge for holding most types of loaded private cars from \$75 per car to \$25 in July 2001, it received complaints from shippers and car owners that the lower charge did not provide sufficient incentive for those unloading the cars to move them out expeditiously. As a result, in July 2002, BNSF restored the \$75 per car charge, with virtually no complaints.

**B. Separate Charges for Holding Empty Private Cars Prior to Loading Is Completely Consistent with BNSF's Policy and Practice of Price Differentiation for Different Services and Components of Services**

BNSF's imposition of storage charges on shippers that require BNSF to hold empty private cars beyond a two-day free period is completely consistent with its general policy and practice of price differentiation to encourage more efficient car movements. As with BNSF's

imposition of storage charges on loaded private cars, the imposition of storage charges on empty private cars initially generated opposition from shippers and car owners who had grown used to the ability to use BNSF's tracks to store their empty cars, but that opposition soon began to fade as shippers and car owners focused on the fact that such charges were only imposed on those who were unwilling or unable to take their cars when they became available. BNSF worked closely with any shipper that could demonstrate a hardship that might result from the transition, including waiving charges where shippers committed to constructing their own track to hold their cars. The number of empty private cars being held on BNSF's track dropped significantly, which reduced congestion on BNSF's sidings, yards, and main track, and improved the flow of traffic to all shippers.

NAFCA suggests that some of its members had a right to expect that BNSF would continue in the future to hold empty private cars on its track at no extra charge because BNSF had done so in the past. But by this reasoning BNSF would never be able to charge separately for any service, or component of a service, that it had not previously charged separately for. It could not have begun charging for storing loaded private cars, because it had not done so in the past. It could not have set higher rates for single-car service and lower rates for multi-car service, because it had not done so in the past. It could not differentiate its rates to take account of the fact that the growth in rail traffic had absorbed much of the capacity on its system, and the problem of congestion and costs of storage had risen apace. It could not favor those shippers that moved their cars efficiently and helped eliminate congestion, but must require all shippers to bear the congestion burden caused by the unwillingness of some shippers to deal with the problem created by their refusal to take their cars when they are ready for delivery.

Needless to say, BNSF does not believe that an exception should be made for some shippers and car owners from the general proposition that under deregulation railroad price differentiation is not simply permitted, but strongly encouraged, where it improves the efficiency of the railroad's operations and avoids cross-subsidization. Far from discriminating against shippers who cause the storage costs, and the congestion that results, BNSF's storage charges properly assign those costs to those that cause them.

**C. BNSF's Line Haul Charges Do Not Include Storage Charges**

One of NAFCA's more curious, though often repeated, assertions is that BNSF's line haul charges already include the costs of furnishing holding tracks; accordingly, NAFCA implies, shippers that pay both line haul charges and storage charges are "double-billed." There are a couple of obvious problems with this assertion.

The first problem with NAFCA's argument is that BNSF's line haul charges cover only the service that BNSF offers under the specific conditions offered. For example, say that BNSF had a single charge to carry widgets from Chicago to all points in Southern California, then BNSF decided to differentiate its charges to different points in Southern California. A shipper that had to pay more than it had paid before could not claim that it was being "double-billed" because previously it had paid the same amount as all other Southern California shippers. By the same token, if BNSF had a line haul charge to carry widgets in private cars, and offered weighing of those cars without any additional charge, it could not be accused of "double-billing" if it determined to start charging separately for weighing. Certainly, weighing had been part of the line haul service that was offered, and it continued to be part of the service offered in the future, but the fact that shippers would now be charged separately for the service would not mean they were "double-billed." It would simply mean that BNSF had changed its billing approach to charge separately for weighing. Similarly, the fact that BNSF begins to charge

shippers extra for storing their cars does not mean that they are being "double-billed." It simply means that they are being charged in the future for a service that they were not charged separately for in the past. Moreover, NAFCA's "double-billing" suggestion completely ignores the fact that BNSF bases its line-haul rates on market demand rather than the costs of the individual components of its service. Of course, BNSF must ensure it covers the minimum direct variable costs of its services, otherwise it would lose money on its shipments. Once those costs have been covered, however, BNSF determines its rates based on the demands and requirements of the market place, rather than by any particular cost formula.

The second problem with NAFCA's argument is that it seems to rest on the assumption that any shipper that had to pay for storage charges should have its line haul rate lowered commensurately (to avoid "double-billing"). Of course, this would defeat the purpose of charging separately for storage, since the shipper would have no monetary incentive to avoid storage. The cross-subsidization involved in such an approach would be obvious, since shippers who did not impose storage costs and congestion on the railroad would pay higher line-haul charges than those that did. NAFCA might claim that the cure for this obviously inequitable and inefficient approach is not to charge separately for storage at all, but this does not alter the cross-subsidization one bit. Shippers that did not impose storage and congestion costs on the railroad would still be charged the same amount as those that did. And shippers that did impose those costs on the railroad would have no incentive to change their ways.

At bottom, NAFCA's assertion that BNSF's line-haul charges include the furnishing of holding tracks simply begs the question of whether BNSF can begin charging separately for a service, or component of a service that BNSF did not charge separately for in the past. Under deregulation, BNSF and other railroads have consistently been encouraged to price differentiate

so as to encourage efficient operations and avoid cross-subsidization. That should include the right to set separate storage charges on private cars, whether loaded or empty, so that shippers and car owners that want such storage are required to internalize their costs. Insofar as BNSF and other railroads are permitted that pricing freedom, their line-haul charges, by definition, do not (and should not) include the furnishing of holding tracks beyond the free period established in their tariffs.

#### **IV. Empty Private Car Diversions**

BNSF explained in its October 29, 2002 Petition for Clarification in this proceeding that its diversion charges were not “directed at the costs of excess empty mileage,” but rather at the cost BNSF incurs “switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location.” See BNSF Petition for Clarification at 14, n.15. The Board in its April 28, 2003 Decision asked whether there were other situations to which BNSF’s diversion charges would apply. See STB’s April 28, 2003 Decision at 4.

As discussed above in Section II. B. BNSF implemented a new policy for empty private car diversions in April 2002. Under the new policy, private car owners may divert a car or a group of cars one time for free. If the private car owners wish to divert that same car or group of cars again, BNSF charges the shipper \$150 per car or bill of lading, up to a maximum of \$450 for a block of cars, if the diversion involves a change of destination or routing. See Item 1100B, BNSF Diversion Book 6200-A. Nearly all second, as well as the majority of first, diversion requests require BNSF to switch or move cars out of one block and into another block in order to accomplish the diversion. Charging shippers for second diversion requests helps BNSF cover the cost it incurs to handle the diversion. In some instances, it is possible that a diversion can be accomplished before a car has been classified into a block, but BNSF still incurs administrative



costs changing the routing instructions for the car after it has been released empty, and usually some operating costs as well getting the car repositioned for a new destination.

As a general matter, railroads automatically return empty private tank cars to their point of origin after they have been unloaded unless they have been directed to do otherwise on the bill of lading. For example, if a shipper loads a tank car with liquid fertilizer at its plant in Houston, Texas and sends it to its customer in Bozeman, Montana, the car will automatically return empty to the shipper in Houston once it is unloaded unless the bill of lading directs the railroad to transport the empty car to another location. A diversion occurs when a customer decides to change the bill of lading, for example, to direct the car to be delivered empty to Baton Rouge, Louisiana after the car is released empty in Bozeman. The diversion could occur anytime after the car has been released empty to BNSF. If the customer decides to redirect the car to Baton Rouge before it is released empty, no diversion occurs.

Most empty private car diversions occur after a car or group of cars have been "classified" by BNSF and switched into a block with a group of other cars that are moving in the same direction. For example, BNSF may receive an empty car at a shipper's plant in Los Angeles, California, where the bill of lading provides that it is to be returned "reverse empty" to Seattle, Washington. BNSF will take the car from the shipper's plant, move it to its staging yard in Barstow, California, where it will switch the car into a block of cars headed for Seattle, Washington. The shipper may then decide to change the bill of lading and divert the car to Houston, Texas instead of Seattle. The shipper can do this at any point after BNSF has pulled the car from the plant in Los Angeles until BNSF delivers the car to Seattle. No matter when the shipper does this, however, BNSF is required to perform additional operational and

administrative services, such as re-switching, reclassifying, and regrouping the car, to effect the diversion.<sup>6</sup>

For example, if the car has been classified and blocked in the Barstow yard with other cars headed for Seattle and the shipper changes the bill of lading to divert the car to Houston, BNSF will have to reclassify the car and switch the car out of the Seattle block and into a block of cars headed for Houston. If BNSF has not yet inserted the Seattle block into a freight train headed for Seattle, BNSF may be able to switch the car or group of cars out of the block before the train leaves for Seattle. If, however, the shipper diverts the car after BNSF has already placed the Seattle block into a line haul train headed for Seattle, BNSF may have to wait until the diverted car moves all the way to Seattle in its original classification group before it can switch it out and send it to Houston in order to avoid delaying all of the other cars moving in that train to Seattle.

BNSF adopted its diversion policy for empty private cars to achieve three main objectives. First, BNSF wanted to discourage shippers from unnecessarily making multiple diversions on empty private tank cars which can result in delays and reduce the efficiency of BNSF's operations.<sup>7</sup> Allowing shippers one free diversion and charging them for all subsequent

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<sup>6</sup> A diversion involving a change in consignee can also require BNSF to perform switching and related operations even if the diversion may not technically involve a change in destination. For example, if BNSF has constructively placed in Houston a block of empty private cars consigned to Sunoco on the PTRF and a shipper changes the bill of lading to make the consignee Exxon on the PTRF, BNSF must switch the cars out of the Sunoco block and move and switch them into the Exxon block to effect the diversion.

<sup>7</sup> Shippers have at least two opportunities to provide BNSF with proper reverse routing instructions for the private empty car and completely avoid a diversion and any attendant delays. Using the above example, if the shipper does not want the empty car to return reverse route to Seattle, it can direct BNSF on the original bill of lading for the loaded move to return the car to Houston after it is unloaded. The shipper may also change the bill of lading to direct the car to

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diversions encourages shippers to avoid unnecessary diversion requests and enhances the efficiency of both BNSF's and shippers' operations.

BNSF also wanted to recover some of the operational and administrative costs it incurs fulfilling shippers' diversion requests. These costs include the operational costs BNSF incurs switching out and moving cars or blocks of cars that a shipper diverts to a new location. (e.g., crew time, engine power time, backhaul costs, etc.) as well as the administrative and record keeping costs associated with changing a shipper's bill of lading. As discussed above, BNSF's diversion book provides its customers with one free diversion on empty tank car moves. Thus, a private car owner is only assessed a diversion charge if it diverts an empty car or block of empty cars more than once. Because a second diversion is more likely to require BNSF to switch an empty car or block of cars out of a line haul train, charging shippers for a second diversion helps to ensure that BNSF recovers some of its switching costs.

The third objective of BNSF's diversion policy was to prevent private car owners from using the diversion process to circumvent BNSF's new storage policy for empty private cars. Previously, private car owners on BNSF's system could divert an empty private car an unlimited number of times at no cost. BNSF was concerned that once its new private car storage policy became effective and it began charging for storing empty private car, some shippers would try to avoid incurring storage charges simply by diverting their empty private cars more than once on

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(... cont'd)

return to Houston instead of Seattle at any time after the car leaves Seattle and before the car is released empty to BNSF at Los Angeles. If the shipper fails to take advantage of either of those opportunities to redirect the car, BNSF will have to perform a diversion. Under BNSF's diversion policy, shippers are not charged for the first diversion. Thus, the shipper can still redirect the car to Houston without incurring any charge.

BNSF's system. BNSF determined that providing shippers with one free diversion and charging them for all second diversions would deter shippers from using the diversion process to avoid paying storage charges.

It must be remembered that unnecessary diversions reduce the efficiency of both BNSF's and shippers' operations. In addition to consuming BNSF's administrative and operational resources, empty private car diversions consume valuable time. BNSF strives to run an efficient rail operation; it cannot do so if its shippers lack incentives to operate efficiently. While BNSF recognizes that diversions sometimes cannot be avoided, it also believes that shippers should use them only when necessary. BNSF believes that its diversion policy provides shippers with the right incentives to effectively and efficiently manage their empty car fleets. BNSF believes that charging shippers for diverting more than once an empty private car or group of cars encourages shippers to be more efficient by giving them the incentive to avoid unnecessary diversions.

**V. Number of Private Cars Needed to Serve Any Shipping Location Is Mainly Due to Business Needs and Decisions of Shipper**

The Board has also asked the parties to comment on NAFCA's assertions that because BNSF controls almost the entire movement cycles of private cars the number of private cars needed to serve any shipping location is largely subject to BNSF's actions. See STB's April 28, 2003 Decision at 4. NAFCA's claims are simply incorrect.<sup>8</sup> The number of private tank cars

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<sup>8</sup> I understand that in its June 26, 2001, filing in this proceeding NAFCA claimed that "BNSF declines to furnish tank cars to its customers." See *North American Freight Car Association—Protest and Petition for Investigation—Tariff Publication of the Burlington Northern and Santa Fe Railway Company*, Docket No. 42060 (June 26, 2001) at 2. This simply is not true. In the past, BNSF has offered to provide tank cars to shippers, and shippers have generally declined such offers. Shippers elected to purchase their own private tank cars for a variety of business reasons.

required to serve any particular location is driven primarily by the business needs and decisions of a particular shipper.

**A. Shippers Purchase and Use Their Own Cars To Accommodate Their Own Business Needs**

Tank cars are highly specialized equipment that are used to ship a wide variety of goods from food stuffs, such as edible oils and liquid sugars (e.g., soy bean oil and syrup), to industrial products, such as kaolin clay and porcelain, to chemicals, such as chlorine gas and liquid fertilizer. As a general matter they cannot be readily interchanged to transport the products of different shippers or even different products of the same shipper. This is because the characteristics of the products they are used to transport makes it extremely difficult and expensive to share tank cars.

First, different types of tank cars are required to transport different products. For example, some products must be transported hot or cold and require an insulated tank car. Other products, including many types of chemicals, must be transported in tank cars that are equipped with special linings and high pressure valves that ensure the safe transportation of the product. Shippers of such products cannot simply use any tank car to transport their product, but must ensure they have the appropriate type of tank car to ship their product.

Second, even where the same type of tank car can be used to transport different products, the cost of using it to transport different products is generally cost prohibitive. For example, a manufacturer of high grade lube oil cannot ship its product in a tank car that has just transported a lower grade of lube oil unless the tank car is first thoroughly cleaned and all of the low grade lube oil residue is completely eliminated from the car. This is because the residual low grade lube oil will mix with the higher grade lube oil and lower the quality and grade of the higher grade lube oil. The cost incurred thoroughly cleaning a tank car is very high. Unlike a hopper

car which can be swept clean, a tank car requires special machinery, cleaning methods, (e.g. steam vs. cold) and cleaning agents. The average cost to clean a general service tank car is around \$650, however, the cost for cleaning more specialized tank cars is approximately \$1,000 (or more). It simply is not cost effective to clean tank cars between every load so that they can transport different types of products back to back, even for the same shipper. This is why, for example, shippers will maintain discrete tank car fleets to transport different grades or qualities of the same general product. For example, a company that produces lube oil will maintain a fleet of tank cars to transport its grade "A" lube oil and another fleet of tank cars to transport its grade "B" lube oil. In this way, the company can ensure the integrity of both its grade "A" and grade "B" lube oil.

Finally, even where sharing is possible between producers of the same type of product, the desire of most shippers to control and protect the integrity of their products makes them unwilling to share tank cars. For example, different shippers of corn syrup generally do not want to share the same tank cars to transport their individual products. Most tank car shippers are extremely concerned with ensuring the integrity of their product and prefer to have complete control over the use, repair, cleaning, and maintenance of cars. Shippers simply do not want to risk their product being contaminated by the presence of other products that were previously transported in the tank car. As a result, tank cars cannot readily be interchanged and used to transport the same commodities for different shippers or different commodities for the same or different shippers. Instead, they must generally be used to transport the same product for the same shipper over and over again.

The number of tank cars required to serve particular locations is also heavily influenced by a shipper's business cycle and the shipper's desire to meet peak demand for its product rather

than any action or inaction on the part of BNSF. The demand for some particular products, such as liquid fertilizer or liquid propane gas (LPG), is cyclical in nature and the producers and shippers of such products generally elect to purchase enough tank cars to handle peak demand. As a result, these shippers and producers generally have a surplus of empty tank cars available during times of low demand. For example, the demand for LPG is generally higher in the summer and winter months. During such times, shippers of LPG generally use their entire private tank car fleet to transport their product. In the Spring and Fall, the demand for LPG is generally lower and shippers of LPG generally have an excess number of empty private tank cars on their hands. Thus, it is the peak demand for the particular shipper's product rather than any action or inaction on the part of BNSF that largely determines the amount of empty private tank cars a shipper requires to serve its facility.

**B. Shippers Have Considerable Control Over The Movements of Private Tank Cars**

I understand that the Board has also asked the parties to comment on NAFCA's claim that "BNSF controls almost the entire movement cycles of private cars, and that the number of private cars necessary to serve any shipping location is largely subject to BNSF's actions." April 28 Decision at 4. NAFCA is essentially arguing that shippers have virtually no control over the movement of their private cars and have been forced to purchase extra private cars as insurance against poor and inefficient service by BNSF. NAFCA concludes that BNSF is therefore obligated to store their idle empty private cars for free for as long the shippers choose to leave them there. As a general rule, the length of time it takes rail traffic to move is inversely related to the amount of traffic congestion on the rail system at any given time. In short, traffic moves more quickly and cycle times improve as congestion on the rail system decreases, and traffic moves more slowly and cycle times increase as congestion increases. Therefore, rather than

supporting the elimination of storage charges, NAFCA's own argument would appear, if anything, to support the assessment of additional efficiency-inducing charges. Moreover, while it is true that the efficiency of BNSF's operations affects a private car's cycle time, NAFCA's claim completely ignores the fact that a private car's cycle time is significantly influenced by the efficiency of a shipper's own operations and its business decisions.

While BNSF controls the amount of time it takes to move any rail car, be it rail owned and controlled or private, from its origin to its destination, the shipper controls where the private cars move to and from and the amount of time a private car sits empty or loaded in BNSF's yard or outside its facility on BNSF's track. The receiver of the load controls and influences when a loaded private car is called in to be unloaded and how long the receiver takes to unload the private car. The shipper also controls when an empty private car is called in to be loaded and the amount of time it takes a shipper to load the car. As discussed above, car providers have the ability to direct cars to different destinations or to change the routing of the car, and shippers frequently do so. All of these decisions are within the influence or control of the individual shipper, receiver, or private car owner and all of these decisions affect a private car's cycle movement time. Shippers have the ability to influence whether their cars are used efficiently and to determine the number of private cars needed to serve a particular facility. They are not at the mercy of BNSF with respect to this issue, despite NAFCA's suggestions to the contrary.

Private car owners and shippers have the ability to charge shippers and receivers demurrage when their private cars are held loaded or empty on private track. As a general matter, charging demurrage in this situation reduces the amount of time private cars are held on private track and reduces a private car's overall cycle time. As a result, the same car can be used more often to transport a shipper's products. As a general rule, most private car owners have not



elected to charge shippers and receivers demurrage for holding their empty or loaded private cars on private track beyond a certain amount of free time. As a result, the amount of time a receiver takes to unload and return a private car and the amount of time a shipper takes to load and ship a private car is generally longer than the amount of time it takes for a railroad owned car.

BNSF has discussed this problem with many of its shippers who use private cars to transport their products and has encouraged them to assess demurrage on loaded and empty private cars held on private track inside shippers' facilities. A few shippers have chosen to do so and their private cars are now turned around more quickly. Consequently the cycle times on their cars have been reduced and they are able to make more trips with fewer cars. As a result, fewer private cars are needed to serve their facilities.<sup>9</sup>

#### **VI. Vast Majority of Tank Cars Operating on BNSF's System Do Not Receive An Allowance Under The Ex Parte No. 328 Tank Car Allowance Formula**

The tank car allowance formula prescribed in Ex Parte No. 328 has become less and less relevant over time. Less than five percent of the tank cars operating on BNSF's system receive an allowance based on the mileage allowance formula contained in Ex Parte No. 328. Today, over 94 percent of the tank cars operating on BNSF's system today are zero rated, meaning that BNSF does not pay any mileage allowance on the individual tank cars and the mileage allowance is instead reflected in the freight rates. Moreover, a significant number of the tank cars operating

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<sup>9</sup> Another factor that accounts for the reduced cycle time of railroad owned and controlled cars is that unless those cars have been assigned to a particular shipper, BNSF can offer these cars to anyone who needs them as soon as they are clean and empty. Unlike private cars, BNSF does not need to wait for instructions from the private car owner as to where to send the car. BNSF can make that decision itself and from the demand information it receives from its customers. In addition, unlike railroad owned and controlled cars, private cars also spend a considerable amount of time returning reverse empty to their point of origin because, unlike railroad owned or controlled cars, they typically move 100 percent empty return. This too, adds to a private car's cycle time.

on BNSF's system for which BNSF still pays an allowance are covered under an individually negotiated allowance rather than under the Ex Parte No. 328 tank car allowance formula.

The main reason most tank cars do not receive a mileage allowance under the Ex Parte No. 328 prescribed formula is because the formula is so complicated to administer. The amount of the allowance paid under the Ex Parte No. 328 prescribed formula is specific to the individual tank car. For example, the allowance due for the use of tank car "A" may be \$0.50 per actual (loaded) mile while the allowance due for the use of tank car "B" may be \$1.00 per actual mile. When establishing freight rates for particular movements, BNSF has to consider the mileage allowance costs of the particular move. If BNSF establishes a freight rate based on the use of tank car "A" and the shipper uses tank car "B", BNSF will earn less revenue on the move than it would if the shipper used tank car "A". BNSF has a couple of choices in this situation. BNSF can establish a complicated freight system of rates and charge shippers different rates for the same movement depending on the tank car used and the car's mileage allowance amount. Such a system is cumbersome for both BNSF and its shippers. Alternatively BNSF can build, and in most cases has built, the allowance amount into the freight rate and charge shippers one rate for the same movement regardless of the particular tank car used. As a general matter, both BNSF and the majority of private tank car shippers have preferred to pay the same rate for the same movement irrespective of the particular tank car used in the move.<sup>10</sup> Only a few shippers, primarily those who qualify for certain Federal and state tax deductions on their products, prefer

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<sup>10</sup> BNSF will generally offer a shipper the choice between a fully rated rate (one that includes the payment of a mileage allowance) or a zero rated rate (one that excludes the payment of a mileage allowance rate). The zero rated rate is always lower than the fully rates rate because BNSF will not be paying a mileage allowance on the tank car. Most shippers prefer to pay the lower freight rate rather than receive a separate mileage allowance payment.

to pay the higher fully rated rate and receive a separate allowance payment because the level of the tax benefit they receive is related to the level of the freight rate they pay; the greater the freight rate paid, the lower the amount of tax they pay on the particular product.

## **VII. Conclusion**

BNSF implemented its private car storage policy in response to a growing problem it had with some private car owners using its track to hold their empty rail cars. BNSF has carefully tailored its private car storage policy to ensure that shippers who store their empty cars on BNSF's track, particularly in areas where congestion is greatest, pay for that service. The number of empty private cars left on BNSF's tracks caused significant congestion on BNSF's system and impaired BNSF's ability to operate efficiently. Every indication is that BNSF's private car storage policy is working.

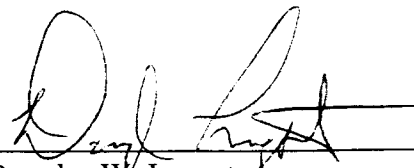
Since BNSF adopted its private car storage policy in July of 2001, the number of empty private cars being stored on BNSF's tracks has declined and the efficiency of BNSF's overall operations has improved. Moreover, the amount of days private cars sit empty in on BNSF or private track has also declined, indicating that private cars are being used more efficiently. This is good news not only for BNSF, but for private car owners as well.

One of BNSF's overriding goals is to run an efficient rail system. BNSF cannot do this without efficient shippers. BNSF's new storage and diversion charges for empty private cars encourage shippers build and improve efficiencies within their own fleets. All evidence to date indicates that these charges are effective and have helped BNSF improve the efficiency of its rail operations. A more efficient rail system is good for BNSF, its shippers, and the American public.

**VERIFICATION**

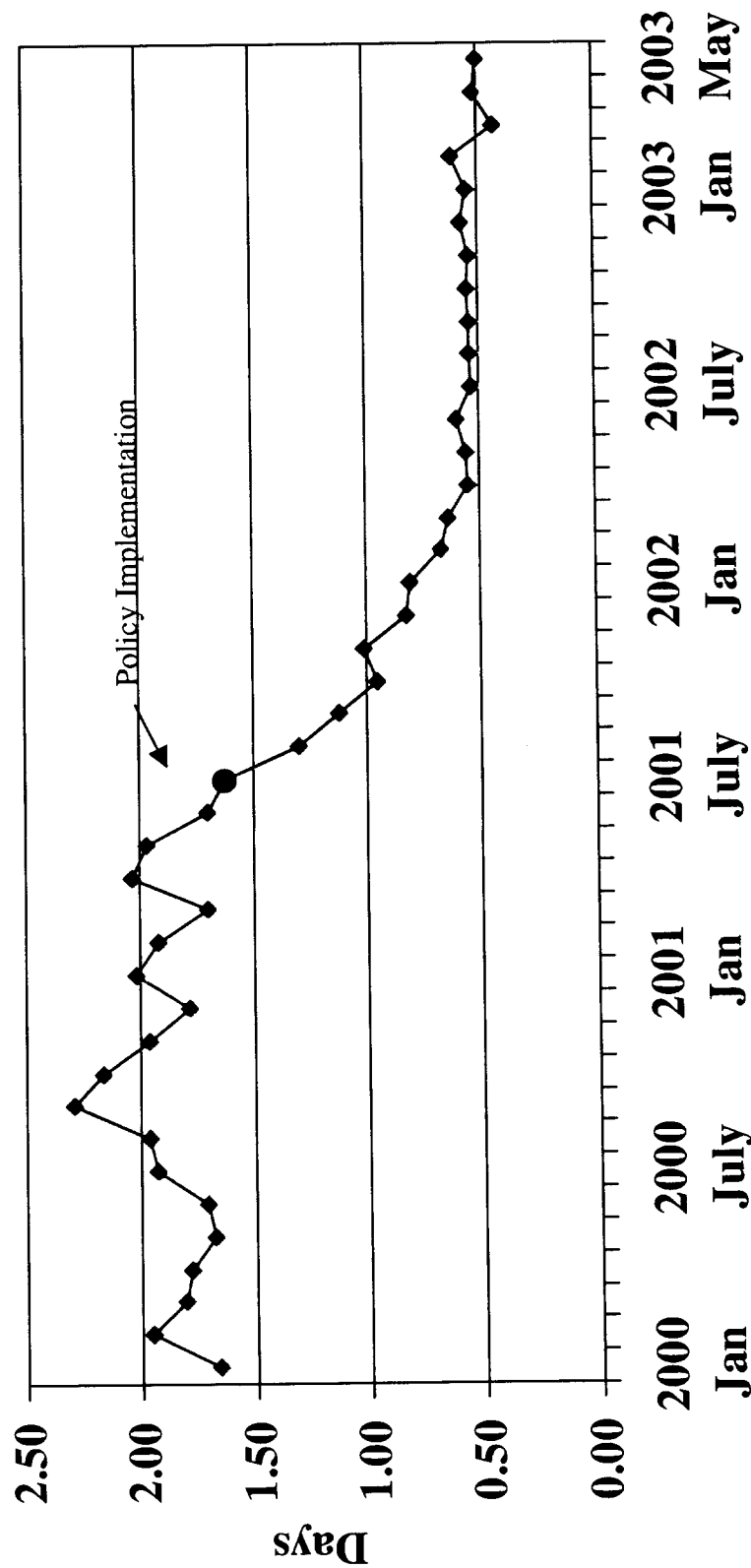
I, Douglas W. Langston, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 9, 2003.

  
Douglas W. Langston

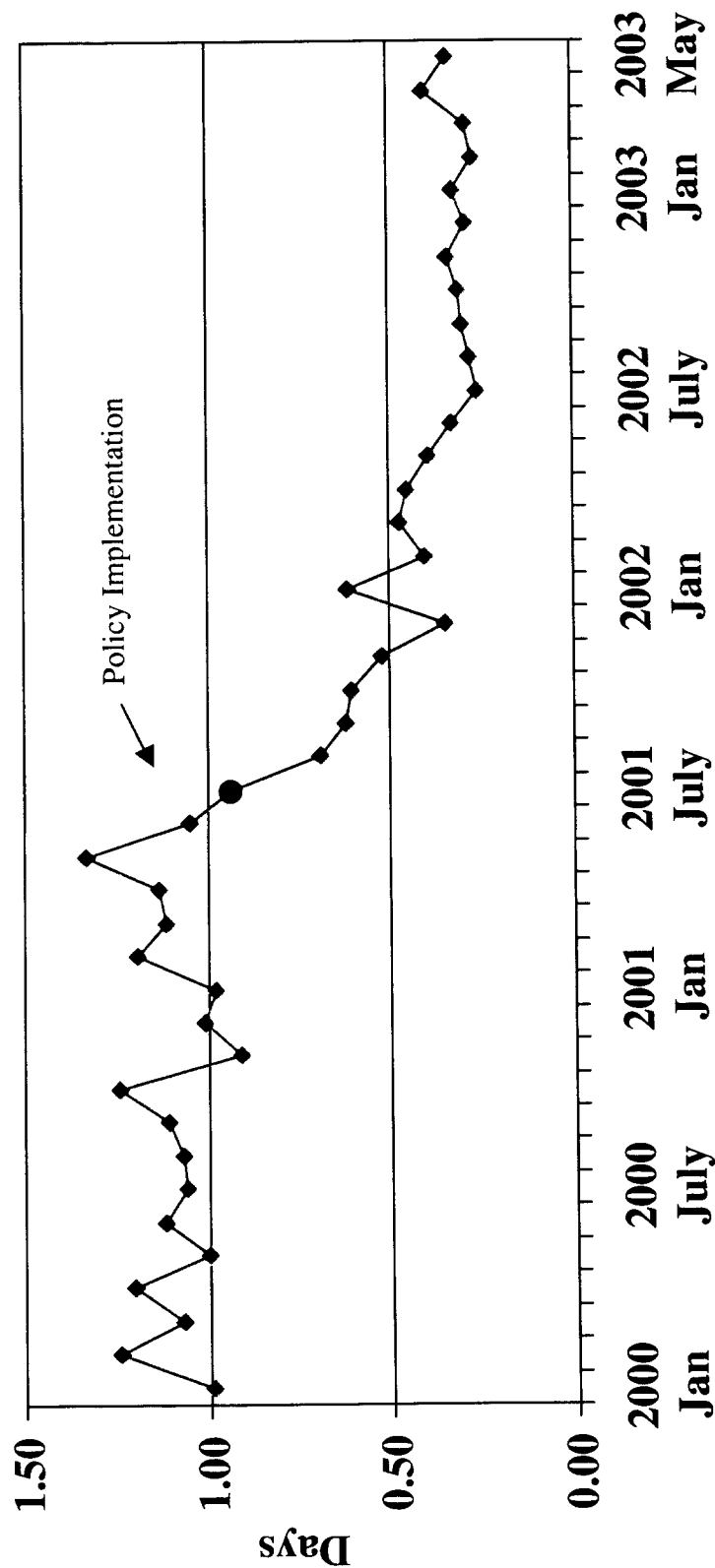
## Exhibit A

### Empty Industrial Private Cars – Average Time Held After Constructive Placement



## Exhibit B

### Empty Agricultural Private Cars – Average Time Held After Constructive Placement



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET No. 42060**

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY**

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**REPLY VERIFIED STATEMENT OF DOUGLAS W. LANGSTON**

My name is Douglas W. Langston. I am a General Director of Demurrage, Storage, and Extended Services for The Burlington Northern and Santa Fe Railway Company ("BNSF") with 13 years of experience in the railroad industry. I previously submitted testimony in support of BNSF's Opening Statement in response to the Board's Decision served April 28, 2003, in the above-captioned proceeding. The purpose of my testimony here is to reply to certain of the statements made in the June 9, 2003, submission of the North American Freight Car Association, the American Chemistry Council, and the National Industrial Transportation League ("NAFCA Submission") in Docket No. 42060, as well as the statements of Mr. Joseph C. Gasz and Mr. Gary T. Kurtz.

**I. BNSF's Private Car Storage Policy Makes Sense**

**A. BNSF's Storage Policy Requires Shippers To Pay For Services They Use**

Over the past two decades, a number of the industries that use private cars to ship their products, such as the plastics and lube oil industries, have experienced tremendous growth in the demand for their products. For example, statistics from the American Chemical Manufacturers

show that from North American producers of major thermoplastic polymers increased their production capacity of various types of plastics by approximately 12 million metric tons (or approximately 38 percent) from 1994 to the year 2000. Although the plastics industry expanded their plant facilities and increased production to meet this increase in demand, many shippers did not increase the amount of available track space to hold empty private cars when they were not needed for loading. Instead, such shippers took advantage of the fact that BNSF was providing them with free storage service. As a result, these shippers began using up more and more of BNSF's track space to store their empty private cars and the amount of congestion on BNSF's system increased accordingly.

As discussed in my opening statement, prior to the adoption of its private car storage policy, BNSF had an excessive number of private empty cars sitting on its tracks. See VS Langston at 2-6. These cars caused significant congestion and hampered BNSF's ability to build trains efficiently and to readily move them through its yards. For example, BNSF was required to move empty cars around its yards and sometimes even between yards in order to create space to prepare blocks of cars for its linehaul trains on a regular basis. BNSF also had to stop empty private cars short of their final destination and store them between the cars' origin and destination because there was no room for them in the serving yard. These types of additional car movements unnecessarily increased the amount of handling and time BNSF needed to prepare its line haul trains, which adversely affected all of BNSF's customers and not just those who used BNSF's track to store their empty private cars, and forced BNSF to incur additional expense moving them around.

As the level of congestion caused by the empty private cars stored on BNSF's system grew, BNSF realized it would have to do something to encourage shippers to stop using BNSF's



track as a parking lot and to keep their cars moving efficiently through the rail system. BNSF wanted to develop a private car storage policy that would help BNSF recoup some of the costs it incurs providing storage service for some private car owners and shippers, curb shipper abuse, and encourage more efficient use of its system. BNSF already assessed storage charges on loaded private cars that were left on BNSF's track for more than a two-day period, and we reached the logical conclusion that a similar program for empty private cars was needed.

BNSF designed and adopted a private car storage policy that encourages shippers to keep their cars moving and helps BNSF recover the costs it incurs storing the empty cars on its tracks. As I discussed in my opening statement, the policy is working. There are fewer empty private cars sitting idle on BNSF's tracks today and clogging up its yards than there were before BNSF adopted its private car policy. Moreover, shippers that use BNSF's tracks to store their empty private cars are now paying for that service. We have also seen an increase in the number of private car shippers asking BNSF for assistance in managing their private car fleets.

I note that NAFCA has made much of BNSF's statement in its February 2, 2001 Service Advisory, announcing the new storage charge policy, that the new charges were intended to "Improve Asset Utilization For Our Customers and Effectively Expand Capacity Without Additional Capital Outlays." NAFCA argues that this statement shows that BNSF is trying to transfer its obligation to provide storage track to shippers. NAFCA Submission at 15. I am not aware of any obligation BNSF has to provide services, such as private car storage, for free. The only issue is whether BNSF may unbundle and establish a separate price for this service that causes shippers to "internalize" the cost of the service. As I explained in my opening statement, railroads have successfully been unbundling and charging separately for their services for a while now and the results have been positive. See VS Langston at 11-12.

As discussed more fully below, BNSF approached private car owners at various times to ask for their help in reducing the level of congestion caused by empty private cars sitting on BNSF's tracks. The majority of private car owners did not respond to these requests and essentially left BNSF with two options. Build or lease track to hold all of these cars and pass along those costs to all of BNSF's customers through an increase in freight rates or adopt a policy that requires those who use BNSF's tracks for storage to pay for that service. Building or leasing new track to store empty private cars would effectively require shippers who do not use BNSF's track to store their empty cars to cross-subsidize those shippers that do. BNSF determined that the most efficient, effective, and fair solution was to ask its customers who use its storage service to pay for that service.

BNSF's storage charges encourage shippers to manage and utilize their fleet more efficiently and to keep their cars off of BNSF's track. Charging shippers who use BNSF's track to store their empty private cars has helped expand the capacity that is available for all shippers by requiring those shippers who clog up the system to internalize the cost of using that service. As a result, fewer shippers are storing their empty private cars on BNSF's tracks today. Congestion on BNSF's system has been reduced and BNSF has been able to free up valuable track space in its yards. This has yielded benefits for both BNSF and all of its shippers.

**B. BNSF Has Worked With Shippers To Help Them Manage Their Cars And Reduce The Need To Store Empty Private Cars On BNSF's Tracks**

NAFCA claims that BNSF failed to give private tank car owners a sufficient amount of time to adjust to BNSF's new private car storage charge policy. NAFCA Submission at 16. This simply is not true. BNSF shared information on its new private car storage policy on numerous occasions well before its proposed effective date. BNSF had also originally intended to make its new storage policy effective on May 1, 2001 but postponed the effective date of the new policy

to July 1, 2001 at the request of several shippers and shipper organizations who wanted additional time to respond to the new policy. BNSF also took steps to help private car owners adjust to the new private car storage policy. BNSF also worked with shippers to help them lease track to hold their empty private cars and adopted a policy of forgiving storage charges for shippers who built holding track within their facilities during the first year of the policy.<sup>1</sup>

**II. NAFA's Claim That Shippers Lack The Ability To Readily Manage The Size Of Their Fleet And Reduce The Amount Of Storage Charges They Pay Is Exaggerated**

NAFA has argued that BNSF's private car storage policy places shippers who use private cars to transport their products at a disadvantage because unlike shippers who have assigned BNSF rail cars, private car owners and lessees cannot as readily terminate their car agreements to avoid paying storage charges when demand for them is low. See NAFA Submission at 20. Moreover, NAFA claims that shippers have no incentive to lease more cars than they need to meet business demands and that there is no reason to believe that the private tank car fleet would be any smaller if BNSF supplied all of the tank cars. *Id.* at 24. The fact is that the tank car fleet might very well be smaller if BNSF supplied all the tank cars. BNSF generally tries to have enough cars to meet average demand or tries to work with shippers to smooth their demand. In contrast, the vast majority of private tank car owners and private covered hopper car owners purchase or lease enough cars to handle peak demand. Therefore, during times of lesser demand, there will inevitably be a surplus of empty private cars.

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<sup>1</sup> Over the years, BNSF employees frequently spoke to tank car and other private car owners regarding the congestion problems BNSF was experiencing due to the excessive number of empty private cars sitting on BNSF's track. On numerous occasions, BNSF representatives discussed with private car owners the need to address the congestion problem caused by empty private cars being stored on BNSF's system. We offered to work with private car owners to help them manage their fleets, but for the most part shippers did not respond to our offers. A significant number of shippers continued to use BNSF's tracks for storage despite our repeated requests that they not do so.

The problems associated with maintaining a fleet to meet peak demands is readily apparent from the following example. It is my understanding that in the plastics industry, most shippers keep enough covered hopper cars on hand to handle their plants operating at 80 to 90 percent of capacity. When production drops significantly (as it has recently to 40 to 60 percent of production) due to a substantial decline in the demand for the products, the shippers have large numbers of empty cars sitting around waiting to be used. These cars create significant congestion problems for BNSF if they are simply left to sit empty on BNSF's tracks waiting for their next load or are preloaded only to wait shipment. Prior to the adoption of BNSF's private car storage policy, shippers lacked any incentive to move the empty cars off of BNSF's track until they were needed to transport product. Now, with BNSF's private car storage policy, shippers have the incentive (and are in fact currently working) to arrange for storage of the cars at a location other than BNSF's track. For example, a few of BNSF's plastics shippers have made arrangements to store their excess empty covered hoppers on shortline track in West Texas instead of on BNSF's tracks. It is unlikely that these shippers would be doing this in the absence of BNSF's private car storage policy.

NAFCA also asserts that private car owners have no incentive to lease more tank cars than they require. NAFCA Submission at 24. However, when shippers can store empty private cars for free, shippers can, under certain circumstances, have an incentive to lease more cars than needed. I note that the cost of leasing a tank car varies with the level of demand for tank cars. Tank car lessors generally have not maintained space to store their empty private cars. Therefore, during times of surpluses, tank car owners can lease their cars at a lower rate to encourage lessees to take the cars off their hands. When storage is essentially free, shippers are more inclined to take advantage of the lower rates and lease more tank cars.

Finally, contrary to the assertions of NAFCA, shippers do have the ability to adjust the size of their private tank car fleets to avoid incurring storage charges. Shippers can enter into short-term leases that allow them to respond more readily to swings in supply and demand. Shippers can also modify the terms of their existing leases. Finally, if a shipper is unable to reduce their fleet size, they can store the cars inside their facilities or lease track if they lack sufficient track space to avoid incurring storage charges.

NAFCA also argues that BNSF's inconsistent cycle times have induced shippers to purchase or lease additional private tank cars as insurance against BNSF's inconsistent service. See NAFCA Submission at 22-24. In support of its assertion, NAFCA claims that the number of days it takes BNSF to move both loaded and empty cars between the same origin and destination pairs vary by as much as 40 percent. *Id.* at 24. NAFCA argues that it is unfair for BNSF to charge shippers for buying or leasing extra cars when they were forced to do so because of BNSF's erratic service. *Id.* NAFCA does not explain the source of the data it used to determine average cycle times for empty and loaded movements from the same origins and destinations so BNSF is unable to determine the accuracy of NAFCA's data. Moreover, NAFCA admits that it did not subject the data to statistical analysis. *Id.* at 23-24. Nevertheless, NAFCA relies on this data to support its assertion that variations in tank car cycle times have forced shippers to maintain larger tank car fleets than necessary to ensure that they always have a sufficient number of cars on hand to transport their product. *Id.*

NAFCA makes the erroneous assumption that variations in cycle times between the same origins and destinations are always due to inconsistent service and that shippers cannot plan for them. However, cycle times from the same origin and destination pairs vary for a variety of reasons and the variations are not necessarily unexpected. For example, a car leaving a plant in

Houston on a Saturday destined for Los Angeles may have a longer transit time than a car leaving the same plant on a Tuesday for the same destination because of variations in scheduled switch times or "published" service plans. Thus, the fact that cycle times vary from the same origin and destination pairs does not indicate whether BNSF's service is inconsistent and interfering with a shippers' ability to manage their tank car fleet.<sup>2</sup> Therefore, NAFCA's claim that variations in BNSF's cycle times require shippers to purchase extra cars is unsupported. Using the above example of a car moving from Houston to Los Angeles, if the shipper knows that the car will take 5 days to arrive if it leaves on a Saturday but only 3 days to arrive if it leaves on a Tuesday, there is no reason the shipper cannot plan and size its fleet accordingly. Moreover, BNSF provides shippers with the tools they need to do so. BNSF publishes its train schedules and switch times and makes them available via the internet. Shippers can review BNSF's schedules and switch times and plan their car needs accordingly. Moreover, BNSF is more than willing to assist shippers in managing their fleet more effectively--all the shippers have to do is ask. I note that many shippers have asked for and BNSF has provided such assistance.

### **III. BNSF's Storage Charges Require Private Car Owners And Assigned Car Shippers To Internalize The Cost of Empty Car Storage And Effectively Manage Their Fleet**

I have also reviewed the statement of Mr. Kurtz and note that he worked for me in 1998 and 1999 as an Equipment Manager. I continued to work with Mr. Kurtz in the equipment group until his retirement from BNSF in 2001. I do note that while at BNSF Mr. Kurtz dealt mainly with covered and open top hopper cars and had very little to do with private tank cars. Mr. Kurtz's statement generally provides an accurate description of how BNSF manages its own rail

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<sup>2</sup> Information concerning whether cars arrive as scheduled would be a better indicator of whether private car owners are forced to purchase extra cars as insurance against inconsistent service, however, it does not appear that NAFCA considered such information.

car fleet and he is correct that BNSF must sometimes store its own empty cars on its tracks when they are not needed. However, NAFCA's assertion that it is unfair for BNSF to charge for storing empty freight cars, irrespective of whether BNSF or another party controls them, is specious. NAFCA Submission at 19-20. NAFCA's comparison completely ignores the fact that BNSF controls its own cars and, therefore, controls where they move and where and how long they are stored. In contrast, BNSF does not control the movement of private cars or rail cars that have been assigned to specific customers ("assigned rail cars"). Many shippers prefer to use private cars or assigned rail cars to transport their products because unlike rail provided and controlled equipment, the equipment is guaranteed to be available whenever they want it. In addition, such shippers take comfort in knowing what product the car previously contained.

BNSF receives demand forecasts from its various shippers regarding their projected car needs. BNSF reviews the demand forecasts and sizes its fleet to match the projected demand. BNSF will place its cars in assigned car pools depending upon where the demand for the cars is. For example, if BNSF receives a demand forecast from a shipper in Denver that it needs 50 covered hopper cars for the next six weeks, BNSF can move some of its cars closer to Denver so that they are available when needed. If the same shipper notifies BNSF that it needs only 25 cars due to reduced demand for its product, BNSF can either take the 25 cars that are no longer needed by the shipper and give them to another shipper or put them in storage. BNSF cannot do this with empty private cars or with its own rail cars that have been assigned to a specific BNSF customer because it does not control them. Instead, BNSF has to rely on the shipper to control them and to direct where and for how long the cars will be stored.

BNSF's demurrage, storage, and diversion charges give shippers the appropriate incentives to efficiently manage and use rail cars when the cars are not under BNSF's control.<sup>3</sup> For example, BNSF assesses demurrage charges on rail cars that are held beyond a reasonable free period after they have been constructively placed. Such charges encourage shippers to quickly load and unload BNSF's rail cars and are only assessed where the car has been placed within the control of the shipper.

BNSF's private car storage charges serve similar salutary purposes. Private cars and assigned rail cars are controlled by the shipper rather than by BNSF. BNSF has no control over what they are used for or how they are used. Absent the imposition of storage charges, such owners and shippers have every incentive to store their cars indefinitely on BNSF's track, where they congest BNSF's track and increase the costs it incurs providing rail service to all of its shippers. One need only look at the number of empty private cars that were left sitting on BNSF's track before BNSF began charging for empty car storage, as proof that this is true. BNSF's diversion charges serve a similar purpose in that they encourage shippers to avoid unnecessary empty private car diversions. Both types of charges serve the important goal of encouraging shippers to manage their fleets and use their cars more efficiently.

#### **IV. Shippers Use Private Tank Cars To Meet The Needs Of Their Business—Not Because BNSF Refuses To Provide Them**

NAFCA continues to insist that shippers use private tank cars because BNSF has refused to provide them. NAFCA Submission at 3, 12. This simply is not true. As with shippers of other private car types, the vast majority of shippers that use private tank cars to transport their products do so for business reasons, not because BNSF refuses to provide them. As discussed in

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<sup>3</sup> I note that private car shippers are now informing BNSF when they have a reduction in demand for their private cars and are working with BNSF to arrange long-term storage of the cars instead of just leaving them sitting in BNSF's yards and on its tracks. This rarely happened before BNSF adopted its private car storage policy.



my opening statement, tank cars are highly specialized equipment that are used to ship a wide variety of goods from food stuffs, such as edible oils and liquid sugars (e.g., soy bean oil and syrup), to industrial products, such as kaolin clay and porcelain, to chemicals, such as chlorine gas and liquid fertilizer. See VS Langston at 21-23. Tank cars generally cannot be readily interchanged to transport the products of different shippers or even different products of the same shipper because the characteristics of the products they transport makes it extremely difficult and expensive to share tank cars. Moreover, even where the same type of tank car can be used to transport different products, the cost of using it to transport different products is generally cost prohibitive. For example, tank cars must be cleaned before it they can transport a product that is different in grade or kind from the product the car had just transported. Tank cars are expensive to clean. They cannot simply be swept clean like a hopper car, but require special cleaning equipment, methods, (e.g. steam vs. cold) and agents. It simply is not cost effective to clean tank cars between every load so that they can transport different types of products back to back, even for the same shipper.

Finally, the desire of most shippers to control and protect the integrity of their products makes them unwilling to share tank cars even where sharing is possible between producers of the same type of product. For example, different shippers of corn syrup generally do not want to share the same tank cars to transport their individual products. Most tank car shippers are extremely concerned with ensuring the integrity of their product and prefer to have complete control over the use, repair, cleaning, and maintenance of cars. Shippers simply do not want to risk their product being contaminated by the presence of other products that were previously transported in the tank car. As a result, tank cars cannot readily be interchanged and used to transport the same commodities for different shippers or different commodities for the same or

different shippers. Instead, they must generally be used to transport the same product for the same shipper over and over again.

**V. BNSF's Experience With Private Car Allowances Demonstrates That NAFCA's Claim That Renegotiating Ex Parte No. 328 Will Lead To "Bitter Litigation Cycles" Over Private Tank Car Allowances Is Baseless**

NAFCA claims that BNSF's position in this case threatens to dismantle the Ex Parte No. 328 regime. NAFCA Submission at 3-4, 13. NAFCA emphasizes that BNSF and other railroads would still have to pay allowances on private tank cars even if allowances were no longer prescribed under the Ex Parte No. 328 allowance formula. *Id.* at 12. NAFCA asserts that the railroads and shippers will engage in "bitter litigation" over tank car allowances if the Ex Parte No. 328 regime collapses. *Id.* It is not BNSF, however, but NAFCA that threatens to upset the Ex Parte No. 328 Agreement with its obstinate claims that BNSF's storage and diversion charges constitute "departure tariffs." BNSF has not sought to renegotiate that Agreement.

In any event, BNSF's experience with respect to private car allowance payments demonstrates that NAFCA's alarmist claims are completely baseless. BNSF, as well as the other railroads, have been setting allowances individually for other types of private rail cars for nearly two decades and to the best of my knowledge neither BNSF nor any of the other railroads have been engaged in bitter disputes concerning them. BNSF and private car owners have successfully resolved any issues they may have had concerning allowances through commercial negotiations, not litigation. In addition, BNSF and private car owners have increasingly moved toward zero-rated rate agreements, meaning that BNSF does not pay any mileage allowance on the individual tank cars and the mileage allowance is instead reflected in the freight rates.<sup>4</sup>

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<sup>4</sup> Incorporating the allowance into the freight rate has enabled both BNSF and private car owners to avoid the administrative burdens and recordkeeping inherently involved in making separate allowance payments.

Today, nearly 98 percent of all types of private cars, such as private covered hoppers, operating on BNSF are zero-rated and do not receive a mileage allowance payment from BNSF.<sup>5</sup> Thus, NAFC's claim that the demise of Ex Parte No. 328 will spawn bitter litigation lacks any factual basis.

Moreover, as already discussed in my opening statement, the vast majority of tank cars operating on BNSF's system today do not receive any allowance, much less an allowance pursuant to the Ex Parte No. 328 formula. Specifically, 94 percent of the tank cars running on BNSF today are zero rated. Further, a considerable number of the tank cars that still receive an allowance receive a commercially negotiated allowance rather than an allowance prescribed under the Ex Parte No. 328 tank car allowance formula.<sup>6</sup> Most private tank car owners have elected not to receive a mileage allowance under the Ex Parte No. 328 prescribed formula, because allowance payments are complicated to manage and track. Private tank car owners have preferred to avoid the administrative burdens and recordkeeping associated with the Ex Parte No. 328 mileage allowance formula and instead have the allowance reflected in the line haul rate or established under an individually negotiated contract. See VS Langston at 26. In light of these facts, I simply cannot see how the demise of the Ex Parte No. 328 Agreement would have any effect on the vast majority of tank car owners that have elected not to receive an allowance pursuant to the Ex Parte No. 328 formula. Nor can I see how the end of Ex Parte No. 328 would result in "bitter litigation" between railroads and private car owners over private car allowances

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<sup>5</sup> Only a few shippers, primarily those who qualify for certain Federal and state tax deductions on their products, prefer to pay the higher fully rated rate and receive a separate allowance payment. This is because the level of the tax benefit they receive is related to the level of the freight rate they pay; the greater the freight rates, the lower the amount of tax they pay on the particular product.

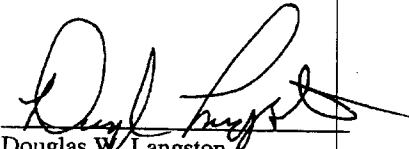
<sup>6</sup> Today, less than 5 percent of the tank cars operating on BNSF's system receive an allowance pursuant to the Ex Parte No. 328 formula.

when it is clear that commercial agreements have been used successfully to resolve issues concerning private car allowances.

**VERIFICATION**

I, Douglas W. Langston, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on July 3, 2003.

  
Douglas W. Langston